Supreme Court, U.S.
FILED

NO. 98 673 OCT 20 1998

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In the Supreme Court of the United States

OCTOBER TERM, 1998

KORDICE M. DOUGLAS,
PETITIONER

VERSUS

DYNMCDERMOTT PETROLEUM OPERATIONS COMPANY, ET AL
RESPONDENT

CIVIL APPEAL TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is an in-house counsel protected under Section 704(a) of Title VII for reasonably engaging in activities opposing discrimination if, in doing so, she discloses confidential client information?

2. Is the appropriate standard for determining whether conduct is "protected activity" under 704(a) of Title VII the balancing test, used by the majority of the circuits, which weighs the right of an employee to reasonably engage in opposition to unlawful employment practices against the employer's right to run its business?

3. Did the Fifth Circuit correctly apply the balancing test in this case?

4. Did the Fifth Circuit err in finding that Douglas engaged in unethical behavior?

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PETITION FOR WRIT OF CERTIORARI

Kordice M. Douglas ("Douglas") respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on June 18, 1998, which reversed the jury verdict and judgment of the district court, Douglas filed a Petition for Rehearing and Suggestion for Rehearing En Banc, both of which were denied on July 23, 1998.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit that gives rise to this petition is *Kordice M. Douglas v. DynMcDermott Petroleum Operations Company; John Poindexter,* reported at 144 F3d 364 (5th Cir. 1998). It is reproduced in the appendix at page A-1. The Order and Reasons of the district court trial judge denyng DynMcDermott's post-trial motions and reducing the judgment to comply with the statutory caps is reproduced in the appendix at page B-1.

JURISDICTION

On June 18, 1998, the Fifth Circuit issued its opinion in *Kordice M. Douglas v. DynMcDermott Petroleum Operations Company; John Poindexter,* cited above. On July 23, 1998, the Fifth Circuit denied Douglas's Petition for Rehearing and Suggestion for Rehearing En Banc, which denial is reproduced at page C-1 of the appendix. Pursuant to Supreme Court Rules 13 (1) and 13 (3), this petition has been filed within 90 days of the denial of the Petition for Rehearing and Suggestion for Rehearing En Banc.

The jurisdiction of the Court is invoked pursuant to U.S. Const. art. III, § 2, cl. 2 and 28 U.S.C. § 1254(1).

STATUTES INVOLVED IN THIS CASE

This case involves the federal statute Section 704(a) of Title VII, codified at 42 U.S.C. § 2000e-3(a), which reads:

> (a) Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings
>
> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor orgnization to discriminate against any member thereof or applicant for membership, **because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participatd in any manner in an investigation, proceeding, or hearing under this subchapter.** (Emphasis added)

Competing with this federal statute in this case is the Louisiana State Bar Association, Rules of Professional Conduct, Rule 1.6, which is codified at Title 37 Chapter 4-Appendix ("Ethical Rule" 1.6). Ethical Rule 1.6 states as follows:

(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in Paragraph (b).

(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1) To prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or

(2) To establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

STATEMENT OF THE CASE

A. FACTUAL BACKGROUND

Douglas is a black female attorney. She was employed as in-house counsel for Boeing Petroleum Services, Inc. ("BPS") from 1987 until March 31, 1993. At BPS, Douglas interacted with the legal department of the Department of Energy ("DOE") on a daily to weekly basis.

Douglas's employment with DynMcDermott Petroleum Operations Company ("DynMcDermott") began on April 1,

1993. There was no gap between Douglas's employment at BPS and at DynMcDermott. Over 90 percent of the employees that worked at BPS made the transition to employment with DynMcDermott. Both companies had the same task; to operate the Strategic Petroleum Reserve for DOE. The legal staff of BPS became the legal staff at DynMcDermott. The only attorney in the legal department of the newly formed DynMcDermott who had not been with BPS was Defendant John Poindexter, the newly hired general counsel.

In the fall of 1993, Douglas complained to Poindexter about the amount of pay she was receiving, compared to the white male attorneys. Poindexter never took any action concerning Douglas's complaint about not getting equal pay.

The relationship between DynMcDermott and DOE was not purely contractual and at arm's length, as characterized by the Fifth Circuit in its opinion. DynMcDermott worked for DOE and only for DOE. There was a DOE counterpart for every position at DynMcDermott. DynMcDermott employees would interact with their DOE counterparts as often as daily. While employed by DynMcDermott, Douglas interacted with the legal staff at DOE on a daily to weekly basis. Douglas had been instructed by her supervisor when she worked at BPS from 1987 to 1993 that DOE was her client. There was a close working relationship between DOE and DynMcDermott.

DOE has the responsibility to oversee the EEO activities of DynMcDermott. DOE conducted an EEO audit of DynMcDermott in 1994, which lasted from April until September of that year. Although Poindexter had prior notice of the 1994 EEO audit by DOE and Douglas worked in the

EEO area, Douglas was given no prior notice of the EEO audit.

Poindexter called her into an EEO audit meeting on June 6, 1994, when he had difficulty answering questions. Present as the meeting were Douglas, Poindexter and three DOE employees. Poindexter remained present during the entire time that Douglas was answering questions in the audit meeting. In response to the auditors questions, Douglas made the comment of "maybe now I'll get mine (equal pay)". Further, Douglas responded that the situation regarding the women at the sites complaining of unequal pay was a "class action waiting to happen". Poindexter never objected or interrupted Douglas. He did not mention Douglas's comments in the EEO audit until the June 22, 1994, performance evaluation meeting.

During the fifteen months that Douglas worked for Poindexter, he did not complain about her job performance until the performance evaluation meeting that he had with her on June 22, 1994, which was two weeks after the EEO audit meeting. At the performance evaluation meeting, Poindexter gave Douglas a "Fully Satisfactory" overall performance rating, which was lower than "Excellent" and "Above Expectations", and only one rating above "Marginal". Poindexter admitted that he rated Douglas "improvement needed" (lowest possible rating) in the category of Judgment because of her comments in the EEO audit. He also rated her "improvement needed" in the category of Perceptual and Analytical because of the BellSouth matter. They discussed both the EEO audit comments and BellSouth at this meeting. Poindexter also told Douglas that he had discussed with Jocelyn Guarisco, head attorney for the DOE office in New Orleans, what Douglas had said in the EEO audit and they had decided that Douglas had broken a

bar rule. Poindexter would not tell her what bar rule he was referring to.

He then mentioned the Becky Rousell incident, which had been discussed at the EEO audit. Ms. Rousell ("Becky R.") complained about her work station being too hot. Her supervisor Mr. Seagrave ("Brian S.") told her it was not too hot, that it was her and she should go see a doctor. She solved the problem by having building maintenance fix the temperature level at her work station, but she filed a complaint about the insensitive remark of her supervisor. Poindexter told Douglas at the performance evaluation meeting that he had counseled Brian Seagrave privately. Douglas was upset because Poindexter admitted he counseled Seagrave, a white male, but he would not counsel her before giving her a negative performance review that would stay in her personnel file.

Douglas wrote a five page "Response to Retaliatory Evaluation" ("Response Letter") two days after the performance evaluation meeting. In the Response Letter she wrote that she was retaliated against because of her comments in the audit and that she was discriminated against because of her race and gender. See Appendix at page D-1.

Douglas mentioned the Becky Rousell matter in her Response Letter (disguised as Becky R. and Brian S.) because it related directly to her complaint that she was the victim of disparate treatment. Douglas did not get counseled on the negative items of the evaluation until after she was written up in the evaluation about them, but Brian Seagrave (white male) was counseled privately by Poindexter. DOE already knew about the Rousell matter because it was discussed at

the EEO audit meeting and Poindexter had already discussed it with Guarisco, a DOE attorney. Furthermore, the subject matter of the Rousell incident was a routine business matter and did not involve any sensitive or confidential information.

Douglas also mentioned the BellSouth Mobility matter in her Response Letter. Again, as was the case with the Rousell incident, the subject matter of this incident was a routine business and administrative matter and did not concern any sensitive or confidential matter. Also, DOE already knew about this matter. Both DOE and DynMcDermott employees were given company cellular phones. The problem arose when some of the employees ran up large bills and did not pay them. This problem was first assigned to Randy Sutton, white male attorney, who also worked for Poindexter. He did not complete the work on the file and it was then given to Douglas. Douglas drafted an agreement to be signed by the employees that they would reimburse the company for the phone bill. However, this agreement was not approved by the DynMcDermott comptroller Carol Parella because she discussed the matter with DOE and they would not approve this agreement for their employees. This was not a confidential matter. DOE had the same problem with the phone bills that DynMcDermott had. Douglas mentioned the BellSouth Mobility incident in her Response Letter because she was rated low on it and because it was an example of disparate treatment. The white male attorney, Mr. Sutton, did not solve the problem but he was not criticized for it as Douglas was.

Douglas delivered copies of the Response Letter to Poindexter, three other DynMcDermott employees and to

Richard O'Neill, one of the three DOE auditors of the June 6, 1994 audit meeting. The audit was still open when Douglas gave O'Neill the Response Letter. In fact, he was the auditor who asked the most questions in the audit meeting of June 6th. O'Neill was also the whistle blower officer and the DOE official who received EEO complaints of reprisal from Dyn-McDermott employees under the contractor employment protection process. DOE Order 3220.2A entitled "Equal Opportunity in Operating and Onsite Services Contractor Facilities" provides a procedure for complaints of discrimination received by DOE concerning discrimination at a contractor facility to be forwarded to the OFCCP, and then to the EEOC. When Douglas gave a copy of her Response Letter to Mr. O'Neil at DOE, she was submitting a written complaint of discrimination to DOE, a procedure that was permitted by DOE Order 3220.2A.

O'Neill asked Douglas if her Response was a whistle blower action, and she replied that she did not know yet, and she would have to consult with her attorney first. Before she had time to check with her attorney, she was fired on July 7, 1994.

Poindexter on August 15, 1994 wrote a letter to Lansing Barrow, a DOE attorney, who was one of the DOE auditors in the June 6, 1994 audit meeting with Douglas. This letter explains Poindexter's alleged reasons for firing Douglas. (See appendix at page E-1). It states that the evaluation of Douglas did focus on her conduct during the EEO audit interview. It also states that she was terminated because of her violation of legal ethics and that one of the violations of legal ethics was her disclosure of confidential information in the audit interview.

B. JURY VERDICT AND TRIAL COURT RULING

The jury returned its verdict finding that Douglas was discharged in retaliation for engaging in activity protected under Title VII. The jury awarded $7,830 in back pay, $238,840 in compensatory damages, and $375,000 in punitive damages. The trial court reduced Douglas's award to $307,830 to comply with the statutory cap on compensatory and punitive damages. The court denied DynMcDermott's post-trial motion for judgment as a matter of law. See Order and Reasons in appendix at page B-1.

The district court held that there was a legally sufficient evidentiary basis for a reasonable jury to find that her comments at the EEO audit meeting were participation in a "proceeding" under Title VII, or that the comments were in opposition to practices made unlawful by Tilte VII.

The court further found that the dissemination of her Response Letter was clearly protected activity. The document alleges sexism, racism, and retaliation. The court also found that providing a copy of the Response Letter to Richard O'Neill of DOE was not unreasonable, because O'Neil participated in the audit on behalf of DOE. Additionally, the court held that Douglas received what she perceived to be a low evaluation because of the comments she made at the EEO audit meeting.

The court further held that Douglas's mention of the BellSouth Mobility incident in her Response Letter was not unreasonable because she had received a negative rating in her evaluation for her handling of that matter. The court also found that Douglas's discussion of the Becky R. and Brian

S. matter in her Response Letter did not disclose any substantive in-house information. This matter related directly to Douglas's claim of disparate treatment in her performance evaluation."

C. OPINION OF THE COURT OF APPEALS

The Fifth Circuit reversed the verdict and judgment of the district court. It held that Douglas, in giving her Response Letter to O'Neill, violated Ethical Rule 1.6 and that, although this unethical disclosure may constitute opposition to practices made unlawful by Title VII, such conduct is unprotected under Title VII (and Section 1981) as a matter of law. See Opinion reproduced in appendix at page A-1.

REASONS FOR GRANTING THE WRIT

A. A Circuit Split Exists Between the Fifth and Third Circuits Regarding Whether an In-house Counsel Is Protected under Section 704(a) of Title VII for Reasonably Engaging in Activities Opposing Discrimination If, in Doing So, She Discloses Confidential Client Information.

In the only other circuit opinion on this topic, the Third Circuit held that the duty of confidentiality for an in-house counsel under the Pennsylvania Rules of Professional Conduct did not preclude a retaliatory discharge claim, when it reversed the trial court's dismissal of that claim. *Kachmar v. SunGard Data Sys., Inc.*, 109 F.3d 173, 179 (3d Cir. 1997).

The Third Circuit refused to affirm the dismissal of the retaliatory discharge claim of attorney on the basis that pursuing the claim would improperly implicate communications subject to the attorney-client privilege and/or information relating to *Kachmar's* representation of SunGard.

The Third Circuit cited the Fifth Circuit's *Doe v. A Corp.* in stating, "a lawyer does not forfeit his rights simply because to prove them he must utilize confidential information." 709 F.2d 1043 (5th Cir. 1983). The *Kachmar* court also cited the Oregon State Bar Legal Ethics Comm., Formal Op. 1994-136, which stated an "attorney may disclose confidences to establish a wrongful termination claim where attorney was terminated after refusing to make false representations on a patent claim."

In the *Kachmar* case, the Third Circuit decided that the in-house counsel should be able to pursue his retaliatory discharge claim, and that if the duty of confidentiality was implicated, certain protective measures were available to the trial court, such as sealing and protective orders, limited admissibility of evidence, or in camera inspection. However, **the trial court is to assess the sensitivity of the information** offered at trial before employing any of these measures. Then it can draft a procedure that permits vindicating the plaintiff's rights while preserving the core values underlying the attorney-client relationship. *Kachmar,* 109 F.3d at 182.

In the case at bar, the possible disclosure of confidential information by Douglas involved two incidents. The first incident was the BellSouth Mobility incident, described above, which involved employees in both DynMcDermott and

DOE who had not paid their phone bills. The second incident, the Rousell incident, also described above, involved a possible insensitive remark by a supervisor about an employee who was uncomfortable with the temperature of her workstation. The sensitivity of the information that Douglas put in her Response Letter, was assessed and determined not to be sensitive by the trial judge. Therefore, there was no need in the case at bar to use sealing and protective orders, limited admissibility of evidence, or in camera inspection. Had the information in the case at bar been sensitive, either Douglas or DynMcDermott could have asked for protective measures. However, because the information that Douglas disclosed was not sensitive in nature, no extra security by a court was necessary.

Whether information is sufficiently sensitive to require the use of protective measures is a fact intensive inquiry appropriate for the trial court. As the Fifth Circuit stated in its opinion, " 'Unless the evidence is of such quality and weight that reasonable and impartial jurors could not arrive at such a verdict, the findings of the jury must be upheld.' " See Appendix at page A-10, citing *Ham Marine, Inc. v. Dresser Indus., Inc.*, 72 F.3d 454, 459 (5th Cir. 1995). Nevertheless, the Fifth Circuit reversed the jury verdict and judgment by the trial judge, in contrast to the Third Circuit, that reversed the dismissal of the retaliatory discharge claim, and sent the case to the fact finder to decide the issue.

B. This Fifth Circuit Application of the Balancing Test Conflicts with That of the First, Third, Fourth, Seventh and Ninth Circuits in Determining If Particular Conduct Constitutes Protected Activity under the Opposition Clause of Title VII.

The First Circuit in the case of *Hochstadt v. Worcester Foundation for Experimental Biology*, 545 F.2d 222 (1st Cir. 1976), used a balancing test to hold that the plaintiff's conduct was not "protected activity" under Title VII when it was balanced against the employer's interest in maintaining a harmonious and congenial working environment. Plaintiff in *Hochstadt* had been constantly complaining to her supervisors and colleagues over her salary and poor rating, which eventually led to extremely hostile and disruptive confrontations throughout the working environment. The Court stated that "Section 704(a) clearly does protect an employee against discharge for filing complaints in good faith before federal and state agencies and for registering grievances through channels appropriate in the particular employment setting." *Hochstadt*, 545 F.2d at 231. In the case at bar, Douglas was making her complaint of unlawful treatment through appropriate channels. The copy of her Response Letter was sent to Mr. O'Neill at DOE because he was involved in the ongoing EEO audit, was the whistle blower officer, and was the officer in charge of EEO complaints. Douglas's conduct was appropriate and reasonable as found by the jury and the district court judge.

In the Third Circuit case of *Hicks v. ABT Associates, Inc.*, 572 F.2d 960 (3rd Cir. 1978), the Court held that by addressing a complaint to the Department of Housing and Urban Development, the source of project funding, plaintiff, a white male who brought a discrimination in employment charge, was in the process of opposing allegedly discriminatory practices by his employer and thus was protected by the Civil Rights Act of 1964. 572 F.2d at 969. *Hicks* is similar to the case at bar in that both plaintiffs took their complaints to a federal agency separate from their employer.

In the Fourth Circuit case of *Laughlin v. Metropolitan Washington Airports Authority*, 149 F.3d 253 (4th Cir. 1998), the Court held that:

> To qualify as opposition activity an employee need not engage in the formal process of adjudicating a discrimination claim. Opposition activity encompasses utilizing informal grievance procedures as well as staging informal protests and voicing one's opinions in order to bring attention to an employer's discriminatory activities. To determine whether an employee has engaged in legitimate opposition activity we employ a balancing test. We "balance the purpose of the Act to protect persons engaging reasonably in activities opposing . . . discrimination, against Congress' equally manifest desire not to tie the hands of employers in the objective selection and control of personnel."

Id., 149 F.3d at 259 (citations omitted).In the case at bar, Douglas was utilizing informal grievance procedures, and the trial court found that this was a reasonable activity in protest of DynMcDermott's discriminatory and unlawful employment practices.

In the Seventh Circuit case of *Jennings v. Tinley Park Community Consolidated School District No. 146*, 796 F.2d 962 (7th Cir. 1988), the court held that the cloak of Title VII protection does not extend to deliberate attempts to undermine superior's ability to perform his or her job. In *Jennings*, the employee engaged in opposition to perceived unlawful employment practice by participating in conduct which hindered another person's ability to perform his job, thereby

relinquishing stautory protection. The Seventh Circuit applied the balancing test. In the instant case, none of Douglas's activities hindered any supervisor or colleague from doing his or her job. Her opposition to DynMcDermott's discriminatory employment practices was legitimate and reasonable under the circumstances.

The Ninth Circuit in the case of *O'Day v. McDonnell Douglas Helicopter Company*, 79 F.3d 756 (9th Cir. 1996) held that a former employee's conduct in stealing sensitive personnel documents was not protected activity under ADEA's opposition clause. In its opinion, the court stated that it had previously adopted the balancing test for determining whether an employee's conduct constitutes "protected activity" under Title VII. The Court adopted the same balancing test for retaliation claims under the ADEA. "The court must balance the purpose of the Act to protect persons engaging reasonably in activities opposing ... discrimination, against Congress' equally manifest desire not to tie the hands of employers in the objective selection and control of personnel." *Id.* at 763.

In the case at bar, the Fifth Circuit reversed the trial court's finding that Douglas's conduct was reasonable, and characterized her minimal and inconsequential disclosures as "unethical conduct." This led to its holding that any unethical conduct by an attorney is not protected by Title VII. The Fifth Circuit also made a finding that any information that she obtained while employed as in-house counsel could not be disclosed to any third party, or this would be an ethical violation. There was no balancing test for attorneys in this situation. The Fifth Circuit in its opinion acknowledges the balancing test in this Circuit stated in

Jones v. Flagship Int'l, 793 F2d 714 (5th Cir 1986) and *Jefferies v. Harris County Action Ass'n,* 615 F.2d 1025, 1036 (5th Cir. 1980). However, in the case at bar, the Court did not use the balancing test. The Fifth Circuit did not determine if Douglas's conduct was reasonable in light of the circumstances, because it did not balance her rights to engage reasonably in activitives opposing discrimination against the employer's right to operate its business. The Fifth Circuit improperly applied the balancing test required in the First, Third, Fourth, Seventh and Ninth Circuits to determine whether particular conduct constitutes activity protected under the opposition clause of Section 704(a) of Title VII.

Furthermore, the Court added a third prong to the balancing test to insure that Douglas's rights to express her opposition to practices made unlawful by Title VII were outweighed. Her rights were weighed against not only the employer's right to operate its business, but also against the legal profession's interest in assuring ethical conduct of its attorney members. The Fifth Circuit in this case holds that attorneys are not entitled to any analysis as to whether their conduct is reasonable when weighed against the reasonable right of the employer to run its business.

Had the balancing test been used, the Court would have concluded, as did the district court judge, that Douglas's conduct was reasonable under the circumstances. Reasonableness plays a role in the proper application of the balancing test. Douglas was threatened by Poindexter that her comments in the EEO audit broke a bar rule. She had been accused of exercising poor judgment by Poindexter. It was reasonable for her to give a copy of her Response Letter to O'Neill because he was the DOE EEO Auditor who asked

the most questions at the audit. It was reasonable to give this auditor a statement that she was being retaliated against because of the audit that O'Neill was still in the process of conducting. It was also reasonable to give him this document because it was a written statement that Douglas was being discriminated against and O'Neill was the whistle blower officer and the person at DOE who received discrimination and retaliation complaints from DynMcDermott employees.

One holding in the *Doe v. A Corp.* case in the Fifth Circuit is that the conflict between protection of the client's need for confidentiality and the lawyer's opportunity to assert a claim against the client cannot be resolved on the basis that one enjoys universal primacy over the other. 709 F.2d 1043 (5th Cir. 1983). The holding in the instant case states that the employer's interest always prevails if there is any unethical breach of duty by the attorney, which the Fifth Circuit holds to be disclosing **any** information gained during the representation of the client. This disclosure should be balanced against the company's right to run its business. If that had been done in this case, Douglas's right to exercise her rights would have prevailed over the company's right not to have the DOE be told some minor information that it already knew about. The Fifth Circuit described this disclosure of information as taking a "baby step." The trial court described the disclosure as minimal.

C. The Supreme Court Has Never Addressed Whether the Appropriate Standard for Determining Whether Conduct Is "Protected Activity" under 704(a) of Title VII Is the Balancing Test Used in Most of the Circuits.

While there exists a well-developed body of federal law, beginning with the Supreme Court case of *Pickering v. Board of Education Township High School District 205*, regarding whether a public employee enjoys constitutional protection against retaliation for exercising her First Amendment rights, the balancing test for retaliation claims of employees as it relates to employment discrimination cases has not been addressed by the Supreme Court. 391 U.S. 563, 88 S.Ct. 1731 (1968).

The Circuits have developed a body of law using the balancing test to determine when an employee is protected under Title VII to oppose unlawful employment practices. The Fifth Circuit in the case at bar has now added a "pretest" to the balancing test. In the Fifth Circuit now, the balancing test does not apply if you are an attorney whose conduct has breached the state ethics code.

Without calling it a balancing test, the Supreme Court in *McDonnell Douglas Corporation v. Green*, 411 U.S. 792, 93 S.Ct 1817 (1973), stated that "nothing in Title VII compels an employer to absolve and rehire one who has engaged in such deliberate, unlawful activity against it." Green had participated in a stall-in to block access to and egress from the employer's plant at a peak traffic hour. In the case at bar, no such "deliberate, unlawful activity" exists.

The Supreme Court should address the balancing test and whether an in-house counsel who discloses a minimal amount of confidential information in opposing unlawful discrimination is subject to the balancing test.

D. The Fifth Circuit Erred in Finding That Douglas Engaged in Unethical Conduct.

In the case of *Doe v. A Corp.*, 709 F.2d 1043 (5th Cir. 1983), the Fifth Circuit held that an in-house counsel did have a right to pursue a legal action on his own behalf for benefits allegedly due him under the company's pension and life insurance plans. The Fifth Circuit discussed Disciplinary Rule 4-101(C), which provides that a lawyer may reveal confidential information and secrets when it is necessary for him to do so to prevent the client from committing a crime, or to defend himself against an accusation of wrongful conduct. "The rationale for the last of these exceptions is: It would be a manifest injustice to allow the client to take advantage of the rule of exclusion as to professional confidence to the prejudice of his attorney, or that it should be carried to the extent of depriving the attorney of the means of obtaining or defending his own rights. ABA Opinion 250." *Doe v. A Corp.*, 709 F.2d at 1048. Douglas was defending herself against an accusation of wrongful conduct by Poindexter.

Pursuant to Louisiana State Ethics Rule 1.6 (b) (2), a lawyer may reveal such informtion (relating to representation of a client) to the extent the lawyer reasonable believes necessary: (2) *"To establish a* **claim or defense** on behalf of the lawyer in a controversy between the lawyer and the client...,or to respond to allegations in any proceeding concerning the lawyer's representation of the client."

Furthermore, Professor McCormick in his highly regarded treatise provides:

"The weight of authority seems to support the view

> that when client and attorney become embroiled in a controversy between themselves, . . . the seal is removed from the attorney's lips . . . as to what is controversy between lawyer and client and decisions do not limit their holdings to litigation between them, but have said that whenever the client . . . makes an imputation against the good faith of his attorney in respect to [her] professional services, the curtain of privilege drops so far as necessary to enable the lawyer to defend [her] conduct. Perhaps the whole doctrine, that in controversies between attorney and client the privilege is relaxed, may best be based upon the ground of practical necessity that if effective legal service is to be encouraged the privilege must not stand in the way of the lawyer's just enforcement of [her] rights to be paid a fee and to protect [her] reputation. McCormick, *McCormick on Evidence* (3d. ed. 1984) §91, pp.221-222. (Emphasis added)

The evaluation review meeting that Poindexter had with Douglas on June 22nd was an imputation against the good faith of Douglas regarding her services as an attorney. For example, Poindexter accused her of exercising poor judgment in her responses to the questions in the EEO audit and he also accused her of violating a bar ethics rule. At the point of time of the performance evaluation meeting, there was a controversy between the lawyer and the client. Therefore Douglas was entitled to bring a defense on her behalf to the controversy with her employer-client regarding her professional services, a controversy which was initiated by Poindexter, her supervisor.

This position is also supported by the ABA Model

Disciplinary Rules 4-101 c(4), which provides an even more explicit authorization for Douglas's Response Letter. It provides:

> © A lawyer may reveal:
>
> (4) Confidences or secrets necessary to establish or collect his fee or to defend himself or his employees or associates against an accusation of wrongful conduct.

In addition to her right to defend herself against accusations of professional wrongdoing, Douglas was entitled to reveal information she obtained during her tenure as in-house counsel to pursue her claim of race and gender discrimination and retaliation.

As stated by the trial judge, providing a copy of her Response Letter to Richard O'Neill was not unreasonable, "Mr. O'Neill had participated in the EEO audit, on behalf of the DOE; it was largely because of the plaintiff's comments at the audit that she received what she perceived to be a negative performance evaluation." See trial judge's Order and Reasons in the appendix at Page B-3. In addition, O'Neill had two other hats he was wearing; whistle blower officer and receiver of EEO complaints. Douglas did not say to O'Neill, "this is not a whistle blower complaint." She said she was not sure at that time, and that she would have to consult with her lawyer. Before she could get back to him, she was fired. The Response Letter was clearly an EEO complaint in that it complained of retaliation for her comments in the EEO audit, race and gender discrimination.

Therefore, in delivering her Response Letter, Douglas was pursuing her claim of discrimination and retaliation through the proper person at DOE and pursuant to the DOE contract provision. Because she was pursuing her claim in a controversy with her employer-client, she was allowed under Ethics Rule 1.6 (b) (2) to disclose information she obtained in the representation of her employer-client.

The holding of this Court that *any* betrayal of a client's confidences that breach the ethical duties of the attorney places that conduct outside Title VII's protection is overly broad. The California Supreme Court held that "under circumscribed conditions, an in-house counsel may pursue a wrongful discharge claim for damages against his corporate employer even though a judgment ordering his reinstatement is not an available remedy" *General Dynamics Corp. v. Superior Court (Rose)*, 876 P.2d 487, 502 (1994). The Court viewed the in-house counsel situation as being

> more analogous to that of corporate managers or senior executives who owe their livelihoods, career goals and satisfaction to a single organizational employer, than to that of an attorney in the traditional attorney-client relationship. Unlike the law firm partner, who typically possesses a significant measure of economic independence and professional distance derived from a multiple client base, the economic fate of in-house attorneys is tied directly to a single employer, at whose sufferance they serve.

Id. at 491. Corporate managers and senior executives owe a fiduciary duty to the corporation and to the stockholders

of the corporation. Under the holding of this panel, if a corporate executive breaches that fiduciary duty, does she lose her opposition clause rights against retaliation by the company that are normally protected by Section 704(a)?

Under the Fifth Circuit's overly broad opinion, an in-house counsel is not protected from company retaliation if she complains about discrimination to any third party, even if it is a government agency, if she includes any information obtained while she was employed at the company. Is this rule consistent with the purposes of Title VII?

The panel's holding as a matter of law that the in-house counsel's actions were a violation of the state bar's ethics rules, improperly usurped the fact-finding function of the jury, in violation of the Civil Rights Act of 1991, which gave a right to a jury trial to Title VII actions. The trial court found that there was minimal disclosure of any substantive information and that any indiscretion on Douglas's part did not warrant much consideration. The Fifth Circuit did not disagree with the trial court's characterization that it was a minimal disclosure of any substantive information. The Fifth Circuit concluded that even a minimal disclosure of information is enough to overturn a jury verdict and a trial judge's opinion.

There was no finding by the jury and no finding by the district court judge that there was unethical conduct by Douglas. The Fifth Circuit has substituted its factual inferences for the jury's reasonable factual inferences in violation of the standard set in *Hiltgen v. Sumrall*, 47 F3d 695 (5th Cir 1995). The panel decision overturns a jury verdict for minimal disclosure of information to DOE, which DOE already had. This violates the Civil Rights Act of 1991,

which specifically added the right to jury trial.

CONCLUSION

For all of the foregoing reasons, Petitioner Kordice M. Douglas urges that this Honorable Court grant her application for writ of certiorari; that the Clerk of the U.S. Fifth Circuit Court of Appeals be requested to certify and transmit the record in No. 96-30883, "Kordice M. Douglas v. DynMcDermott Petroleum Operations Company; John Poindexter", that a briefing schedule be set, and that after all due proceedings are had herein, the judgment of the U.S. Fifth Circuit of Appeals be reversed and the jury verdict and judgment of the district court be reinstated.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 96-30883

FILED
JUN 18 1998

KORDICE M. DOUGLAS,

Plaintiff - Appellee-Cross-Appellant,

versus

DYNMcDERMOTT PETROLEUM OPERATIONS COMPANY; JOHN POINDEXTER,

Defendants - Appellants-Cross-Appellees.

Appeals from the United States District Court for the Eastern District of Louisiana

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Before JOLLY, DAVIS, and BARKSDALE, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:

This case presents the question whether an in-house counsel's disclosing informally to third parties information

relating to interoffice complaints of discrimination against her constitutes a breach of her professional ethical duties of confidentiality and loyalty, and if so, whether such conduct is protected under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, and 42 U.S.C. § 1981. We hold that, although an attorney's unethical disclosures may constitute opposition to practices made unlawful by Title VII, such conduct is nevertheless unprotected under Title VII (and § 1981) as a matter of law. Accordingly, we reverse the verdict and judgment of the district court.

DynMcDermott Petroleum Operations ("DynMcDermott") is a private corporation that employs over 900 individuals and manages the Department of Energy's (the "DOE") Strategic Petroleum Reserve facilities. Kordice Douglas is a black female attorney. She was hired by DynMcDermott to review procurement contracts, oversee ongoing litigation, and assist DynMcDermott's human resources department with legal issues. As in-house counsel, she was privy to all of her employer's legal files and confidential information concerning employee disputes.

Before signing on with DynMcDermott, Douglas worked as in-house counsel for Boeing Petroleum Services, Inc. ("BPS"), the company that previously had managed the petroleum reserve facilities. DynMcDermott successfully bid on the management contract for the facilities and took over its administration in 1993. More than 90% of BPS employees made the transition to employment with DynMcDermott, including Douglas who initially began work with DynMcDermott on April 1, 1993, without a temporal gap between employment. Douglas's job responsibilities and salary remained the same except that she also was assigned to serve

as the primary legal contact for the human resources department of DynMcDermott.

The relationship between DynMcDermott and the DOE was purely contractual and at arm's length. Under the contract, DynMcDermott simply agreed to perform certain managerial and administrative services for the DOE. The contract required that DynMcDermott operate free from discriminatory practices, but DynMcDermott neither implicitly nor explicitly waived any of its rights of confidentiality or privilege with respect to its in-house counsel. In connection with the antidiscrimination provision, DOE officials met with DynMcDermott employees at various times to assure that DynMcDermott was complying with this aspect of the contract ("EEO audits"). Just such a meeting occurred on June 6, 1994, between John Poindexter-DynMcDermott's general counsel and Douglas's supervisor—and three DOE employees.

Poindexter requested that Douglas attend the June 6 meeting because she was familiar with the DOE's particular areas of inquiry regarding DynMcDermott's employment practices. DynMcDermott was unhappy with Douglas's professional conduct at this meeting. Specifically, the DOE auditors asked if Douglas were aware of any equal pay claims of women at the different sites. Douglas indicated that she was not, but further responded, "Maybe I'll get my money now. "[1] When informed by the DOE of a large number of

[1] This remark arose in the context of demonstrating Douglas's alleged dissatisfaction with her salary. Douglas submits that she previously had discussed her dissatisfaction with her salary with Poindexter, that he had failed to take any action on her behalf, and that her remark at the audit was a protest of her allegedly unequal pay.

complaints that it had received from DynMcDermott employees, Douglas also voluntarily offered her opinion that it was a dangerous situation — "a class action waiting to happen." She further informed the auditors of one particular employee's (Becky Roussell's) discrimination complaint that had not been resolved to the employee's satisfaction. The day after the meeting, Douglas disclosed to the DOE attorney, who had initiated the audit, additional information—allegedly confidential—regarding her investigation into Ms. Roussell's claim.[2]

Two weeks after the meeting with the DOE auditors, Poindexter met with Douglas to discuss her written performance evaluation. One of the comments in the evaluation indicated that Douglas had failed to exercise good judgment during the June 6 meeting with the DOE officials. Douglas objected to several critical comments in her evaluation, including one concerning her alleged lack of discretion during the DOE meeting. Poindexter upwardly adjusted several specific ratings, but maintained her overall evaluation of "fully satisfactory."

Douglas was still dissatisfied with her performance evaluation. Thus, a few days later, she composed a five-page response (hereinafter "Response Letter" or "Response" or "Letter") to her evaluation in which she complained that she had been subjected to racial and sexual discrimination. She also further discussed events surrounding Becky Roussell's complaint and a separate business matter that she had

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[2] The day after the audit, Douglas told the DOE attorney that she had prepared a report of the "Becky incident," but that she thought DynMcDermott's Human Resources Department managaer had changed the report.

handled for DynMcDermott involving BellSouth Mobility. Douglas presented her Response Letter not only to Poindexter but also to three other DynMcDermott employees, and to Richard O'Neill, a whistle-blower officer with the DOE. Upon inquiry from O'Neill, however, Douglas confirmed that the DOE was not to treat the Response as a whistle-blower complaint.

When DynMcDermott learned that Douglas had furnished her Response Letter to an individual outside the confines of the company, it convened a "termination board" to discuss the consequences of Douglas's actions. The board members included the president, the director of human resources, the deputy project manager, and Poindexter, the company's general counsel. After meeting several times and conducting research into Douglas's attorney-client duties of loyalty and confidentiality and the company's duties under the antidiscrimination statutes, the board unanimously agreed to terminate Douglas's employment. DynMcDermott informed Douglas of the decision on July 7, 1994.

After her termination, Douglas forwarded her Response Letter to several other individuals outside DynMcDermott, including the local head of the NAACP, Congressman William Jefferson, and Hazel O'Leary, the Secretary of the DOE. In addition to the Letter, Douglas also furnished O'Leary with a package of DynMcDermott's private documents gathered from the company's legal files before she was discharged. She later filed a claim of discrimination with the EEOC alleging as the sole basis of liability that DynMcDermott retaliated against her when she "opposed practices made unlawful under Title VII." The EEOC issued her a right-to-sue letter and she timely filed an action in federal

district court.

II

Douglas filed suit in the Eastern District of Louisiana against John Poindexter, DynMcDermott, and other corporations connected to DynMcDermott alleging (1) retaliation under Title VII, (2) retaliation under 42 U.S.C. § 1981, (3) conspiracy under 42 U.S.C. § 1985, (4) race discrimination under § 1981 regarding her right to enter into future employment contracts as an attorney, (5) race and sex discrimination under Title VII, and (6) state law claims for defamation, intentional infliction of emotional distress, and gender discrimination. She sought back pay, compensatory and punitive damages, injunctive relief, and reinstatement with DynMcDermott or front pay. Ruling on the defendants' motion to dismiss, the court dismissed Douglas's § 1981 retaliation claim and her § 1985 conspiracy claim, but otherwise allowed her action to proceed to trial.

The jury returned its verdict finding that Douglas was not terminated because of her race or sex, but that she was discharged in retaliation for engaging in activity protected under Title VII. The jury refused to award front pay, but allowed $7,830 in back pay, $238,840 in compensatory damages, and $375,000 in punitive damages.[3]

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[3] The two verdict forms provide in relevant part:

VERDICT FORM

1. Do you find by a preponderance of the evidence that plaintiff's race was a determining factor in DynMcDermott's decision to discharge her?

Yes ____ No X

The district court entered judgment for Douglas for $621,670 against DynMcDermott and Poindexter, dismissed all claims against the remaining defendants, and denied

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footnote 3 continued

PROCEED TO QUESTION NO. 2.

2. Do you find by a preponderance of the evidence that plaintiff's sex was a determining factor in DynMcDaermott's decision to discharge her?

Yes _____ No X

PROCEED TO QUESTION NO. 3.

3. Do you find by a preponderance of the evidence that a determinative factor in the plaintiff's discharge was that she engaged in an activity protected by Title VII?

Yes X No _____

PROCEED TO QUESTION NO. 4.

4. a) Do you find by a preponderance of the evidence that defendant John Poindexter made a defamatory statement about the plaintiff to a third person?

Yes _____ No X

IF YOU ANSWERED "NO" TO PART "a," PROCEED TO QUESTION NO. 5. IF YOU ANSWERED "YES" TO PART "a," PROCEED TO PART "b."

b) Do you find that the statement was privileged, that is made by the defendant in good faith with an interest of duty to a party with a

front pay and reinstatement after finding that Douglas would have been legitimately terminated for her unethical conduct

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footnote 3 continued
corresponding interest or duty?

Yes _____ No _____

PROCEED TO QUESTION NO. 5.

5. a) Has plaintiff proven by a preponderance of the evidence that the conduct of defendant John Poindexter was extreme and outrageous?

Yes _____ No X

IF YOU ANSWERED "NO" TO PART "a," PLEASE SIGN AND DATE THIS FORM BELOW AND ANSWER NO FURTHER QUESTIONS. IF YOU ANSWERED "YES" TO PART "a," PROCEED TO PART "b."

b) Has plaintiff proven by a preponderance of the evidence that defendant John Poindexter desired to inflict severe emotional distress or knew that severe emotional distress would be certain or substantially certain to result from this conduct?

Yes _____ No _____

VERDICT FORM

* * *

4. a) Do you find that the defendants would have legitimately terminated the plaintiff based on statements made by the plaintiff to Lansen Barrow the day after the audit interview with the plaintiff?

Yes _____ No X

of gathering internal legal documents before her discharge. The court subsequently amended the judgment to comport with the statutory cap on compensatory and punitive damages under Title VII, which reduced Douglas's final award to $307,830, and memorialized that Douglas prevailed only on her Title VII claim of retaliation against DynMcDermott and Poindexter. All parties appealed.

III

DynMcDermott[4] argues, in sum, that Douglas disclosed client confidences in her Response Letter, that her actions thus cannot be classified as "protected activity" under Title VII's opposition clause, and that she was terminated because of her unethical disclosures and not because of her participation in any protected activity. Douglas counters that the evidence adduced at trial supports the jury's verdict that she engaged in protected activities and that those activities prompted DynMcDermott to retaliate against her by terminating her employment. Further, in making her own appeal Douglas

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footnote 3 continued
PROCEED TO PART "b."

b) Do you find that the defendants would have legitimately terminated the plaintiff for collecting records that belonged to DynMcDermott's legal department prior to her termination on July 7, 1994?

["Yes" written in]

* * *

[Signed and dated by the jury foreperson]

[4] For convenience, we will refer to both DynMcDermott and Poindexter as DynMcDermott, unless specifically addressing an issue relevant only to Poindexter.

argues that the district court erred in dismissing her retaliation claim under § 1981 and that we should reinstate the jury's total award of damages because § 1981 has no statutory damages cap.

We need not reach the latter issues because we hold that Douglas's conduct constituted a breach of her duties of confidentiality and loyalty to DynMcDermott, that, accordingly, the conduct was not protected activity as a matter of law, and that DynMcDermott therefore did not unlawfully retaliate against her when it terminated her employment because of that conduct.

IV

We employ a deferential standard of review when examining a jury's verdict for sufficiency of the evidence. *Ham Marine, Inc. v. Dresser Indus., Inc.*, 72 F.3d 454, 459 (5th Cir. 1995). "Unless the evidence is of such quality and weight that reasonable and impartial jurors could not arrive at such a verdict, the findings of the jury must be upheld." *Ham Marine*, 72 F.3d at 459. We may not reweigh the evidence, re-evaluate the credibility of the witnesses, nor substitute our reasonable factual inferences for the jury's reasonable inferences. *Hiltgen v. Sumrall*, 47 F.3d 695, 699-700 (5th Cir. 1995). We must view the evidence in the light most favorable to upholding the jury's verdict and may only reverse if the evidence points "so strongly and overwhelmingly in favor of one party that the court believes that reasonable men could not arrive at a contrary conclusion." *Hiltgen*, 47 F.3d at 700; *Pagan v. Shoney's, Inc.*, 931 F.2d 334, 337 (5th Cir. 1991). Questions of law, of course, we review *de novo*. *United States v. O'Keefe*, 128 F.3d 885, 893 (5th Cir. 1997), *cert. denied*,

___ U.S. ___, ___ S.Ct. ___, ___ L.Ed.2d ___, 1998 WL 130816 (1998); *Munn v. Algee*, 924 F.2d 568, 575 (5th Cir. 1991).

V

A

Douglas is a member of the Louisiana Bar and is thus governed by the Louisiana Rules of Professional Conduct. She is duty-bound, as are all lawyers, not to disclose her client's confidences without authorization and loyally to serve the interests of her client. Rule 1.6 provides in toto:

> (a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).
>
> (b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:
>
> (1) To prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or
>
> (2) To establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was

> involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

Louisiana State Bar Articles of Incorporation, Rules of Professional Conduct, Rule 1.6, La. Rev. Stat. Ann. § 37:219 Ch.4-App., Art. 16 (hereinafter "Ethical Rule" 1.6).[5] Thus, except under specified limited circumstances, an attorney may not divulge her client's confidences. *See United States v. Cavin*, 39 F.3d 1229, 1308 (5th Cir. 1994); *Abell v. Potomac Ins. Co.*, 858 F.2d 1104, 1124 (5th Cir. 1988) (noting that disclosing material facts to third persons may breach duty to keep confidences as required by good ethics), *vacated on other grounds sub nom. Frvar v. Abell*, 492 U.S. 914, 109 S.Ct. 3236, 106 L.Ed.2d 584 (1989). A "confidence" in this context means exactly what the rule says—any "information relating to representation of a client." Ethical Rule 1.6 (a); *see also Prennan's, Inc. v. Brennan's Restaurants, Inc.*, 590 F.2d 168, 172 (5th Cir. 1979) (noting ethical duty of confidentiality is broader than evidentiary privilege; confidentiality involves all "information" gained in representation, as opposed to "confidence" or "secret").

In addition to the duty of confidentiality, Ethical Rule 1.7 provides that "[l]oyalty is an essential element in the lawyer's relationship to a client." The duty of loyalty to the client, with which the duty of confidentiality is inherently intertwined, is one of the basic tenets of the legal profession. *Cavin*, 39 F.3d at 1308. The obligations of this profession are

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[5] The ethical rules provide us with guidance in evaluating an attorney's conduct appearing before us as they set out the profession's own articulation of its ethical standards. *Brennan's, Inc. v. Brennan's Restaurants, Inc.*, 590 F.2d 168, 172 n.5 (5th Cir. 1979).

not "merely hortatory appeals to [one's] conscience," but enforceable strictures of a lawyer's conduct. *Id.; McCuin v. Texas Power & Light Co.*, 714 F.2d 1255, 1264-65 (5th Cir. 1983) ("An ethical code is not a garment that lawyers may don and doff at pleasure."). Violation of one's ethical duties can lead to sanctions as severe as disbarment.

These duties—confidentiality and loyalty—serve to fortify the client's trust placed with the attorney and to ensure the public's confidence in the legal system as a reliable and trustworthy means of adjudicating controversies. *See In re American Airlines, Inc.*, 972 F.2d 605, 618-20 (5th Cir. 1992) ("The trust a lawyer's duty of loyalty inspires in clients encourages them freely to confide in the lawyer and freely to rely on the advice provided by the lawyer.") (citing *E.F. Hutton & Co. V. Brown*, 305 F.Supp. 371, 395 (S.D. Tex. 1969); *Duncan v. Merrill Lynch*, 646 F.2d 1020, 1027 (5th Cir. 1981) ("[T]he integrity of the judicial system would be sullied if courts tolerated . . . [the unethical disclosure of confidential information] by those who profess and owe undivided loyalty to their clients.")); *McCuin*, 714 F.2d at 1265 ("The purpose . . . [of eithical precepts] is to preserve public confidence in the bar and in the legal process.").[6]

B

(1)

Against the backdrop of these declarations

[6] For a contrary view as to the necessity of the duty of confidentiality, see Danier R. Fischel, *Lawyers and Confidentiality*, 65 U. Chi. L. Rev. 1 (Winter 1998) (submitting that the duty of confidentiality is used as an economic incentive that benefits the legal profession more than the client or the public).

demonstrating the obligations of confidentiality and loyalty in a lawyer's relationship with her client, we must first determine whether Douglas breached her professional ethical duties. We therefore turn to the specifics of the information that Douglas disclosed to persons outside DynMcDermott.[7] In her Response Letter, Douglas wrote:

> I wish to deal with one instance specifically. The complaint of Becky R. regarding Brian S. I interviewed Becky and looked at the documentation and wrote a response. I specifically asked John Poindexter if I could speak to Eugene T. and Brian S. I was told No. I turned the letter over to him. I never heard a response. In the performance evaluation meeting, he told me he spoke to Brian S. privately. This is an example of disparate treatment. Brian S. can get a private consultation about something that was documented, but, yet, I am asked to listen more and improve my interpersonal relationships with other employees in writing in a performance evaluation.

She also discussed in some detail her handling of a business matter with BellSouth Mobility on behalf of DynMcDermott. She included in her Response Letter her employer's wishes with respect to the matter and the steps she took in dealing

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[7] In her brief, Douglas notes that the evidence would not support a finding that DynMcDermott terminated her employment because of the disclosures she made during the EEO audit or in the conversation she had with a DOE officer a day after the meeting. We agree that the evidence is clear that these disclosures were not the basis for DynMcDermott's decision to discharge her. Therefore, like the parties, we restrict our discussion to the information revealed in Douglas's Response Letter that she disseminated to outside parties.

with the file.[8]

The disclosed matters clearly include information that Douglas gained through her representation of her client, DynMcDermott, and is "*information* relating to representation of [that] client." Ethical Rule 1.6 (a) (emphasis added). As we have noted before, the "use of the word 'information' . . . is particularly revealing of the drafters' intent to protect all knowledge acquired from a client. . . . This is true without regard to whether someone else may be privy to it." *Brennan's, Inc.*, 590 F.2d at 172. The disclosed matters thus, pursuant to Ethical Rule 1.6 (a), constitute confidences and Douglas divulged them to the DOE. The next question to be considered is whether Douglas's indiscretions amounted to a breach of her duties of confidentiality and loyalty.

(2)

Douglas first contends that her disclosures were justified because she reasonably understood the DOE to be her client along with DynMcDermott. This argument is patently implausible. DynMcDermott alone hired her, directed her, and paid her salary. Douglas completely understood that DynMcDermott was her sole employer There

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[8] For instance, Douglas noted that when a BellSouth Mobility matter became a problem, DynMcDermott turned the file over to her. She set out in her Response Letter what actions she took with respect to the matter, such as contacting BellSouth Mobility and all of the involved employees and drafting a payment agreement. She also stated that Carol Parrella, presumably employed as part of DynMcDermott's upper management, did not want DynMcDermott's employees to sign the payment agreement and that she drafted a second agreement. All of these disclosures were "information relating to representation of a client" under Rule 1.6 and thus constituted confidential information.

is no evidence that the DOE ever retained or relied on her services as an attorney or that DynMcDermott consented to any dual representation by her. *See* Ethical Rules 1.7, 1.13 (setting out prerequisites before attorney may consent to dual representation; noting duties specific to corporate counsel).

Douglas had been engaged in the practice of law for almost fifteen years when DynMcDermott hired her. If she is serious in her contention that she considered the DOE to be her client in conjunction with the corporation she was specifically employed to represent, she has a distorted understanding of her professional duty. DynMcDermott was her client; it hired her and paid her. The DOE was not her client; indeed, the DOE was a potential adversary to her client. DynMcDermott therefore reasonably expected her loyally to represent it—which obviously encompassed the expectation that she would not disclose its confidences to third parties.

In the alternative, Douglas argues that because she was instructed as in-house counsel for her former employer, BPS, to treat the DOE as her client, it was reasonable for her to assume that DynMcDermott also desired that she maintain a similar relationship with the DOE when DynMcDermott took over management of the petroleum reserve facilities. From this assumption, Douglas extrapolates that DynMcDermott consented to the disclosures under Ethical Rule 1.6 (a). That Douglas's former employer may have so consented is irrelevant. DynMcDermott—her one and only client during the time at issue—did not expressly or impledly consent to any such arrangement or to the disclosures here involved. *See* Ethical Rule 1.6 (a). In sum, Douglas cannot ethically justify her disclosure of client confidences to the DOE under

Ethical Rule 1.6 (a) because (1) DynMcDermott was her sole client and (2) DynMcDermott did not consent to the disclosures.

(3)

Because she revealed to third parties information relating to her representation of DynMcDermott—i.e., the company's handling of an internal complaint and her dealings with the BellSouth Mobility matter—Douglas breached the duty of confidentiality unless the disclosures fall within one of the limited exceptions in Ethical Rule 1.6 (b). Douglas maintains that she ethically revealed the confidential information because she reasonably believed that the matter she publicized to the DOE was necessary to establish her claims of discrimination in the workplace.[9] In her Response Letter, she cited an example of alleged disparate treatment in the companys procedures for handling internal complaints: She received a written report that would be placed in her employment file while 'Brian S."—a white male— was only privately

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[9] A second exception allowing disclosure occurs when an attorney reasonably believes it necessary "to respond to allegations in any proceeding concerning the lawyer's representation of the client." Ethical Rule 1.6 (b) (2). Here, however, when Douglas made the disclosures, no "proceeding" was ongoing between DynMcDermott and Douglas.

Because Douglas represented an organizational client, an additional exception may theoretically be available under Ethical Rule 1.13 ("[I]f a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action . . . in a matter related to the representation that is a violation . . . of law which reasonably might be imputed to the organization, . . . the lawyer shall proceed as is reasonably necessary in the best interest of the organization." Ethical Rule 1.13. Douglas has not urged this section as a basis for her actions in this appeal, however, and we generally do not consider arguments that have not been raised by the parties. *United States ex rel. Thompson v. Columbia/HCA Healthcare Corp.*, 125 F.3d 899, 903 n.3 (5th Cir. 1998).

reprimanded.[10]

Although we have doubts as to whether Douglas's disclosures of confidential information reasonably were necessary to establish a claim of discrimination, we need not address this issue because she simply was not attempting to establish a "claim or defense" on her behalf in a controversy with DynMcDermott when she provided the DOE officer with a copy of her Response Letter containing client confidences. When the DOE officer asked whether he should treat the Letter as a whistle-blower complaint, Douglas responded that he should not do so at that time. This negative answer leads ineluctably to the conclusion that Douglas's disclosures do not fall within the narrow exception contained in Ethical Rule 1.6 (b) (2). We thus conclude that the evidence establishes as a matter of law that Douglas breached her duty of confidentiality, and thereby her duty of loyalty, to DynMcDermott.

C

(1)

We must next determine, in the light of our conclusion that Douglas violated her ethical obligations, whether Douglas demonstrated that DynMcDermott unlawfully retaliated against her when it terminated her employment.

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[10] Demonstrating that similarly situated employees were not subjected to adverse employment actions for engaging in conduct identical to that in which the plaintiff engaged may be illustrative of discrimination. *Nieto v. L&H Packing Co.*, 108 F.3d 621, 623 & n.5 (5th Cir. 1997); *Barnes v. Yellow Freight Sys., Inc.*, 778 F.2d 1096, 1101 (5th Cir. 1985). We note, however, that Douglas proffered no meritorious argument justifying her revelations with respect to the BellSouth Mobility matter.

Title VII imposes liability for unlawful retaliation where (1) the employee engaged in activity protected by Title VII, (2) the employer took adverse employment action against the employee, and (3) a causal connection exists between that protected activity and the adverse employment action. *Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 705 (5th Cir.), *cert. denied*, _____ U.S. _____, 118 S.Ct. 336, 139 L.Ed.2d 260 (1997); *Shirley v. Chrysler First, Inc.*, 970 F.2d 39, 42 (5th Cir. 1992). The ultimate determination is whether, "but for" the protected conduct, the employer would not have engaged in the adverse employment action. *Long v. Eastfield College*, 88 F.3d 300, 305 n.4 (5th Cir. 1996); *Johnston v. Harris County Flood Control Dist.*, 869 F.2d 1565, 1571 (5th Cir. 1989) (noting employee must prove causation-in-fact); *McDaniel v. Temple Indep. Sch. Dist.*, 770 F.2d 1340, 1346 (5th Cir. 1985) (same).

Activities protected under title VII fall into two broad categories—opposition and participation. An employee has engaged in protected activity when she has (1) "opposed any practice made an unlawful employment practice" by Title VII or (2) "made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing" under Title VII. 42 U.S.C. § 2000e-3 (a); *Grimes v. Texas Dep't of Mental Health & Mental Retardation*, 102 F.3d 137, 140 (5th Cir. 1996). Douglas claims protection under both prongs.

(2)

(a)

Douglas first contends that she engaged in protected participation when she responded to the DOE officers' ques-

tions at the EEO audit and when she disseminated her Response Letter to O'Neill. As we have suggested *supra* in footnote 7, no evidence indicates that DynMcDermott was motivated to terminate Douglas because of her comments during the EEO audit.[11] Although clearly unhappy with her remarks at the audit, the evidence shows that DynMcDermott was satisfied to address that matter in its performance review. Douglas's conduct during the EEO audit is relevant to her discharge only as part of the background to her subsequent response to her performance rating. We thus focus only on the repercussions associated with Douglas's Response Letter.

(b)

Douglas maintains that her Response Letter also constitutes protected participation because it "should have been forwarded [by the DOE] to the EEOC." The participation clause affords protection under Title VII by prohibiting retaliation for assistance and participation in *any manner* "in an investigation, proceeding, or hearing" under the

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[11] Although the evidence will not support a finding that DynMcDermott was motivated to fire her because of her conduct in the EEO audit, Douglas maintains that sufficient evidence supports a finding that the comments she made in the EEO audit resulted in the "low" rating she received on her evaluation and that her rating is thus evidence of retaliation, albeit not of retaliatory discharge. This contention is meritless. In the first instance, DynMcDermott rated her performance as "fully satisfactory." We find it difficult to ascribe as low a "fully satisfactory" rating. Second, even were we to allow that the rating Douglas received was "low," the evidence is insufficient to demonstrate that the evaluation itself constitutes an adverse employment action actionable under Title VII. *See Matttern*, 104 F.3d at 707; *Dollis v. Rubin*, 77 F.3d 777, 781-82 (5th Cir. 1995); *Landgraf v. USI Film Prods.*, 968 F.2d 427, 431 (5th Cir.),. *aff'd*, 511 U.S. 244, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994).

statute. 42 U.S.C. § 2000e-3 (a); *Merritt v. Dillard Paper Co.*, 120 F.3d 1181, 1186 (5th Cir. 1997); *Pettway v. American Cast Iron Pipe Co.*, 411 F.2d 998, 1006 n.18 (5th Cir. 1969). Douglas, however, specifically instructed O'Neill not to treat the Letter as a whistle-blower complaint. She thus did not participate in an "investigation, proceeding, or hearing" within Title VII's parameters and her five-page Response Letter, informally given to third parties, does not fall within that class of activities protected under the participation clause.

(3)

(a)

Our determination that Douglas's conduct does not qualify for protection under the participation clause does not end our inquiry, however, because we must also consider whether we may fairly characterize the Response Letter as an opposition activity. Douglas's response purports to complain of racism, sexism, and retaliation—all of which Title VII deems unlawful employment practices. As such, the Letter appears to meet the litmus test for activity constituting opposition under Title VII. We thus assume, for the purposes of this opinion, that Douglas's Response qualifies as opposition activity.

Not all activities taken in opposition to an employer's perceived discriminatory practices, however, remain insulated from reprisal under Title VII's shield. *Smith v. Texas Dep't of Water Resources*, 818 F.2d 363, 365-66 (5th Cir. 1987); *Jones v. Flagship Int'l*, 793 F.2d 714, 727 (5th Cir. 1986). We have recognized that some conduct, even though engaged in with the most sincere of intentions, may be so inappropriate

as to justify the curtailment of statutorily-afforded safeguards. *Jones,* 793 F.2d at 727.

Our precedents have employed a balancing test to determine whether Title VII's protections may be denied to an employee's activities that adversely affect his effective performance of job duties. *Jones,* 793 F.2d at 727. "[T]he employer's right to run his business must be balanced against the rights of the employee to express his grievances and promote his own welfare.' " *Jefferies v. Harris County Community Action Ass'n,* 615 F.2d 1025, 1036 (5th Cir. 1980) (quoting *Hochstadt v. Worcester Foundation for Experimental Biology,* 545 F.2d 222, 230-34 (1st cir. 1976)). The yardstick against which the employee's conduct must be measured is the flexible and protean doctrine of "reasonableness in [the] light of the circumstances." *Jefferies,* 615 F.2d at 1036.

For instance, in *Rosser v. Labaorers' Int'l Union of North America, Local No. 438,* we held that the plaintiff's form of opposition was unprotected as a matter of law. 616 F.2d 221, 224 (5th Cir. 1980). The plaintiff in that case had been employed as the dues-posting clerk for the secretary-treasurer of the union. After being approached by black union members who felt the union was discriminating against them, Rosser decided to run against her boss for his elected position. She eventually was disqualified from the race and was discharged from her employment with the union after her boss was re-elected. Rosser contended that she was fired in retaliation for her engagement in opposition activity. We agreed that she was fired because of her opposition activity, but we ruled in favor of the defendant on the basis that Rosser's form of opposition—seeking her boss's job—placed her loyalty and cooperation in serious doubt and accordingly

fatally diminished her effectiveness as a dues-posting clerk. *Rosser*, 616 F.2d at 224. We held that her conduct was thus unprotected under Title VII as a matter of law and that her employer therefore had a legitimate non-discriminatory reason for discharging her. *Id.*

We have since reaffirmed *Rosser*'s analysis, noting that "[t]here may arise instances where the employee's conduct in protest of an unlawful employment practice so interferes with the performance of his job that it renders him ineffective in the position for which he was employed. In such a case, his conduct, or form of opposition, is not covered by § 704 (a)." *Jones*, 793 F.2d at 727 (quoting *Rosser*, 616 F.2d at 223).

In *Jefferies*, this court faced a situation that bears some similarity to the conduct found in this case. The plaintiff was a black female who, while employed by the defendant, copied and disseminated confidential employment records that tended to document her belief that she was a victim of discrimination. After her termination, Jefferies sued for unlawful retaliation, arguing that her conduct was protected because she had been attempting to bring attention to an employment practice that allegedly discriminated against her. *Jefferies*, 615 F.2d at 1036. After weighing "the employer's right to run his business" against Jefferie's right "to express [her] grievances and promote [her] own welfare," we determined that the plaintiff's form of opposition was unprotected. *Id.* We noted that Jefferies's conduct was clearly unreasonable in the light of the circumstances and her employer legitimately discharged her because of it. *Id.*

Jones is yet another of our precedents that have found employee conduct unprotected under Title VII. Just as the

conduct in *Jefferies* is similar to that of Douglas's publishing confidential information—, the plaintiff's position of trust in *Jones* is approximate to that enjoyed by Douglas before her termination. Like Douglas, Jones was a licensed attorney hired by Flagship to handle charges of discrimination lodged against it and to represent it before state and federal administrative agencies, including the EEOC. *Jones,* 793 F.2d at 716. Flagship fired Jones after learning that she had filed a charge of discrimination with the EEOC, had solicited others to join in her suit, and intended to serve as the named representative of a class action against her employer. We determined that her conduct was unprotected under Title VII because it rendered her ineffective for the position for which she was retained. *Id.* at 728.

(b)

These precedents bring us to the immediate case we consider today. They serve to illustrate that employee conduct, although fairly characterized as protest of or opposition to practices made unlawful by Title VII, may nevertheless be so detrimental to the position of responsibility held by the employee that the conduct is unprotected. Douglas's behavior fits into this general category.

Furthermore, Douglas's conduct not only undermined her effectiveness as an employee, but her actions also violated the ethical rules of the legal profession. Here, while employed as in-house counsel for DynMcDermott, Douglas breached her professional duties of confidentiality and of loyalty when she revealed to a third party information relating to the represen-

tation of her client. She took no precautions[12] to preserve the attorney-client relationship and instead acted with thoughtless indiscretion, demonstrating little regard for the ethical obligations inherent in the legal profession. This dereliction of professional duties meant that DynMcDermott could no longer place full trust in her to keep confidences that she may acquire as its attorney. In short, the trust undergirding the attorney-client relationship was broken and Douglas could no longer function in her role as in-house counsel. *See Rosser*, 616 F.2d at 223 (noting that employee's conduct can so malign the relationship that continued employment is impossible). Her conduct, on the whole, also reflected poorly on the legal profession and its obligation to maintain standards of trust and loyalty.

We therefore turn to the weighing process that our precedents have employed in other similar contexts. We first weigh the importance of the employer's reasonable expectation that its in-house counsel abide by the profession's ethically imposed duties of confidentiality and loyalty. Corporations hire in-house counsel specifically with the expectation that the attorney's loyalty may be fully relied upon. A corporate lawyer is expected to defend her employer-client when adversary proceedings arise and may not with very limited and specified exceptions, act detrimentally to the employer-

12 Even when revealing confidences falls within an exception to the ethical rules, there are appropriate means for revealing confidences that limit the dissemination of information disclosed. They include requesting *in camera* review, requesting that the court seal the record in any proceeding, and obtaining permission to prosecute the action without revealing the true name of either party. *See, e.g., Doe v. A Corp.*, 709 F.2d 1043, 1045 n.2 (5th Cir. 1983); *United States v. Scott*, 909 F.2d 488, 494 n.10 (11th Cir. 1990) (noting different protective measures attorneys may take to protect client confidences when they suspect a client of intending to commit perjury).

client's interests. In fact, by accepting employment, a lawyer chooses to place his loyalties with his employer-client and agrees to act as its confidant and advocate. An in-house attorney enjoys a unique position of special trust, and her employer-client necessarily occupies a concomitant position of vulnerability with respect to its relationship with its counsel. The ethical precepts of confidentiality and loyalty serve to assure that that trust is not misplaced and to shield the employer-client from an abuse of the power that the attorney has acquired as a result of her unique position of confidence. The employer-client's reasonable expectation that its attorney will abide by the profession's ethical edicts is thus entitled to great weight.

In addition to weighing the interests of the employer in determining whether unethical conduct should be protected under Title VII, we, as a court, must also consider the interests of the legal profession, whose members' ethical conduct is critical to the integrity and reputation of the courts and their processes. It is axiomatic that the legal profession has a vital interest in promoting the ethical conduct of its members, and as strong an interest in discouraging unethical conduct. These interests would be struck a damaging blow if the law afforded some safe harbor for unethical conduct. To forgive a breach by allowing the legal protections sought in this case obviously would have repercussions beyond this one case because such a ruling would carve out a class of individual rights that trump professional ethical considerations—and, by extrapolation, could lead to further tolerances with unanticipated consequences to the profession,

and thus become yet another bissagiatt.[13] The particular duties at stake here—confidentiality and loyalaty—are of indisputable importance to the attorney-client relationship itself, as this opinion has repeatedly pointed out. Furthermore, they instill a faith in the system necessary for the public to trust our legal system in the resolution of its disputes—again, as we have made abundantly clear in this opinion.

Furthermore, when an attorney is granted the privilege of joining the ranks of this profession, she agrees to abide by the ethical rules of the profession. These obligations are fully understood by the attorney and, thus, the profession's expectation that its members will obey its internal canons is also reasonable. Finally, the ethical rule that Douglas breached, with its noted exceptions, is a reasonable rule to require of in-house counsel as well as of the profession generally.

We next weigh an attorney's right under Title VII to oppose allegedly discriminatory practices by her employer. It is an extremely important right that we do not gainsay in the least. But in engaging in the balancing exercise here, we must be more specific. The specific right asserted by Douglas is the right to oppose the allegedly unlawful practices of her employer-client, and to do so in such a manner that violates the ethical duties of the legal profession. As we have noted, when Douglas became an attorney, she became bound to abide by the ethical rules of the profession. When she was hired as an attorney by DynMcDermott, she

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[13] William Rasberry, *Defining Deficiency Down*, the Washington Post, May 29, 1998, at A27 (coining the acronym "bissagiatt" from the phrase "But It Seemed Such a Good Idea at the Time").

became its defender and advocate. Although she surely did not surrender her Title VII rights when she signed on with DynMcDermott as its in-house counsel—and no one is suggesting that she did——she did in fact assume professional responsibilities that constrained her exercise of these rights.

Requiring adherance to the profession's ethical precepts does not strip an attorney of all Title VII protections. Indeed, ethical Rule 1.6 specifically provides for disclosure once disclosure becomes necessary in a dispute with the employer-client, Rule 1.6 surely does not bar Douglas's opposition and protest in her conversations, dialogue, and remonstrations with her employer-client.

In sum, although the right to oppose unlawful practices under Title VII is a right that, independently, is entitled to great weight in the balancing test, the exercise of that right in violation of the profession's ethical duties of confidentiality and loyalty simply will not counter the weight of the employer-client's rights and the duty owed to the legal profession.

We therefore conclude that when an attorney's Title VII right to oppose her employer-client's allegedly discriminatory practices by disclosing confidential information contrary to the ethical obligations of the profession is balanced against her employer-client's right to ethical representation and the profession's interest in assuring the ethical conduct of its members, the employer's and the profession's interests must prevail. Given the obligations to which an attorney agrees when she joins the profession and when she accepts employment, and the importance of the duties of confidentiality and loyalty to the employer-client

and to the integrity of the profession, we hold as a matter of law that conduct that breaches she ethical duties of the legal profession is unprotected under Title VII.[14]

In reaching this holding, we are aware that the trial court determined that there was "minimal disclosure of any substantive information" and, therefore, that any indiscretion on Douglas's part did not warrant much consideration. This conclusion was error because, as we hold today, any betrayal of a client's confidences that breaches the ethical duties of the attorney places that conduct outside Title VII's protection.[15] The employer-client need not tolerate baby steps of unethical conduct while anxiously wondering when and if the giant step will occur, and with what consequences. Once the trust between attorney and client is breached in violation of professionally sanctioned duties. Title VII

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[14] Douglas also maintains that the district court erred when it dismissed her § 1981 claim for retaliatory discharge on the basis that such a claim was not cognizable. *See Patterson v. McLean Credit Union*, 491 U.S. 164, 179-80, 109 S.Ct. 2363, 2374, 105 L.Ed.2d 132 (1989); *Carter v. South Central Bell*, 912 F.2d 832, 840 (5th Cir. 1990) (holding that § 1981 does not encompass retaliatory discharge claims). She contends that the Civil Rights Act of 1991 superseded *Patterson* and *Carter* and now allows such a claim. We need not reach this issue because, even were employees now able to bring retaliatory discharge claims pursuant to § 1981, we hold as a matter of law that DynMcDermott did not engage in unlawful retaliation when it terminated Douglas's employment because of her conduct that constituted ethical violations of her professional duties.

[15] Conduct that does not constitute a breach of the legal profession's ethically imposed obligations, but that nevertheless adversely impacts the employment relationship between an in-house counsel and her employer-client, remains subject to the balancing test set out in *Jefferies* and *Jones* before it may be determined to be unprotected conduct under Title VII.

provides no shield from retaliation.[16]

[16] As is obvious from our opinion, we do not address violations of Title VII against an attorney that, although arising from the same factual scenario, occur independent of the ethical breach. We only make it clear that an attorney who violates her profession's ethical rules is not entitled to any damages flowing from retaliation taken by her employer-client because of her violative conduct. So long as the conduct actually constituted a violation of the profession's ethically imposed duties, the employer is insulated from liability irrespective of whether it took adverse employment action because the conduct constituted a breach or because the conduct was in opposition to discriminatory employment practices. *See Rosser*, 616 F.2d at 224 (holding opposition activity unprotected even though motive for discharge remained disputed).

APPENDIX B

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

FILED
NOV 7 '96

KORDICE M. DOUGLAS	CIVIL ACTION
VERSUS	NO. 95-1967
DYNMCKERMOTT PETROLEUM OPERATIONS CO. AND JOHN POINDEXTER	SECTION C

ORDER AND REASONS

Defendants, DynMcDermott Petroleum Operations Co., Inc. and John Poindexter ("Defendants") have filed a motion for judgment as a matter of law or, in the alternative, motion for remitter and denial of punitive damages. The plaintiff, Kordice M. Douglas, opposes. For the reasons stated below, the amount of recovery for compensatory and punitive damages is reduced to $300,000, the motion is otherwise denied.

Judgment as a matter of law is appropriate if a party has been fully heard on an issue and "there is no legally sufficient evidentiary basis for a reasonable jury to find for

that party on that issue." Fed. Rule of Civil Procedure art. 50(a); *Seven-Up Co., v. Coca-Cola Co.,* 86 F.3rd 1379, 1387 (5th Cir. 1996). Such a judgment should be granted only when the facts and inferences point so strongly and overwhelmingly in favor of the moving party that reasonable persons could not arrive at a contrary verdict. *Boeing Company v. Shipman.* 411 F.2d 365, 374 (5th Cir.1969) (en banc).

Did the Plaintiff Engage in a Protected Activity?

The defendants first argue that the plaintiff was not engaged in a protected activity under Title VII (a) when she participated in the DOE audit and (b) when she disseminated her response to her performance evaluation.

A person participates in protected activity when the person either "oppose(s) any practice made an unlawful employment practice under this subchapter" or "has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." 42 USC§2000e-3.

With respect to the DOE audit, it is undisputed that the audit was for the purpose of reviewing DynMcDermott's EEO policies and complaint procedures. Such policies and procedures, as well as their audits, would be unnecessary but for Title VII. Arguably then, the audit itself was a "proceeding" that falls within the ambit of §2000e-3. Certainly, Ms. Douglas "participated" in that audit and her comments were made in conjunction with it.

Furthermore, Ms. Douglas' first remark at the audit constituted a personal complaint, even if jokingly made, of her

own disparate pay and her second remark was a warning of possible legal liability for unlawful employment practices at the site in general. Both of these, social grace aside, could reasonably be considered expressions of opposition to practices made unlawful under Title VII. That her employer reacted with such displeasure underscores that her comments were construed by the defendant as a criticism of the company's performance in that area. Consequently, the Court finds there was a "legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue."

Even if the above were not sufficient, the Court finds that the plaintiff's dissemination of her five page response to her performance evaluation was clearly protected activity. The Document itself alleges sexism, racism and retaliation. The defendants do not strongly argue otherwise, but rather rely on a claim that the dissemination outside DynMcDermott (specifically to Richard O'Neal of the DOE) was unreasonable and therefore unprotected. This is a significant point because defendant Poindexter stated that the reason the plaintiff was terminated was because she distributed her response to "persons outside of DynMcDermott."[1]

The Court finds that providing a copy of her response to Richard O'Neal was not unreasonable. Mr. O'Neal had participated in the EEO audit, on behalf of the Department of Energy; it was largely because of the plaintiff's comments at that audit that she received what she perceived to be a negative performance evaluation.

The crux of the defendants' complaint is that the

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[1] August 15, 1994 letter from John Poindexter to Lansen Barrow.

plaintiff disclosed confidential matters in her memorandum which should not have been disclosed to persons outside the company. These matters related to (1) bills from Bell South Mobility and (2) the manner in which other employees' performances were evaluated compared to hers. With respect to Bell South, the plaintiff's performance evaluation specifically referenced her handling of that matter as a reason for a negative rating. The plaintiff's response referencing it was therefore not unreasonable. Most of her explanation dealt with generic steps she took in handling the matter, with minimal disclosure of any substantive information. Likewise, her discussion of "Becky R." and "Brian S." did not disclose any substantive in-house information. It also related directly to the plaintiff's complaint that she was the victim of disparate treatment in her performance evaluation. For those reasons, the Court finds there was a 'legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue."

Were Punitive Damages Justified?

The jury awarded the plaintiff $375,000 in punitive damages. The defendants argue that the evidence was insufficient to show malice or a reckless indifference to the federally protected right. In support, the defendants point to the various steps the defendants took prior to the termination: (1) forming a termination review board of top management level employees; (2) defendant Poindexter's testimony that he researched corporate counsel's responsibilities regarding confidentiality of the client; (3) presentation of that information to the review board and their subsequent discussions; (4) the unanimous decision to terminate the plaintiff; (5) the review by the Human Resources Director who certified that

the decision was not in violation of anti-discrimination law.

The jury in this case was attentive and specific. While it found sufficient evidence of retaliation, it rejected the plaintiff's claims of racial and/or gender discrimination. The jury also rejected her claim of defamation and intentional infliction of emotional distress. The jury also significantly limited the plaintiff's back pay on the basis of after-acquired evidence justifying termination.

The jury concluded that the given reason for the termination - that the plaintiff disclosed confidential matters to persons outside the company - was ill-founded and a pretext for the improper firing, a conclusion that was not unreasonable. This discerning jury could then reasonably conclude that the elaborate steps taken, including defendant Poindexter's alleged research, were intended as a deliberate smokescreen to hide their true motive. Such a conclusion would support a finding of malice or reckless disregard for the plaintiff's rights. There was a "legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue.'

Should the awards be reduced?

The defendants challange the award of $238,840 for compensatory damages and the award of $375,000 for punitive damages. Under 42 U.S.C. §1981a(b)(3), the plaintiff is entitled to an aggregate sum of no more that $300,000, combining both compensatory and punitive damages. Accordingly, the awards are reduced to a total of $300,000.

Should the backpay be reduced?

The jury awarded the plaintiff backpay of $7,830. The defendants claim the award should be limited to $5,075.75, an after taxes computation. The Court finds that the jury figure is reasonable and that an after tax asssesement is not appropriate as the backpay recovery is taxable.

Is the plaintiff entitled to compensatory or punitive damages arising after the date termination would have been justified?

The defendants argue that the after acquired evidence doctrine should not only limit the plaintiff's backpay but also her compensatory and punitive damages as well. The defendants can cite no binding authority for that propositon. Nor does this Court find the argument persuasive, at least in this factual situation.

/s/ G. Berrigan
District Judge

November 7, 1996.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 96-30883

FILED
JUL 23 1998

KORDICE M. DOUGLAS,

Plaintiff - Appellee-Cross-Appellant,

v.

DYN McDERMOTT PETROLEUM OPERATIONS COMPANY; JOHN POINDEXTER,

Defendants - Appellants-Cross-Appellees.

Appeals from the United States District Court for the Eastern District of Louisiana

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ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion 6/18/98, 5 Cir., _____, _____ F.3d _____)

Before JOLLY, DAVIS and BARKSDALE, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FED. R. APP. P. and 5TH CIR. R. 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor, (FED. R. APP. P. and 5TH CIR. R. 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ E. Grady Jolly

United States Circuit Judge

APPENDIX D

RESPONSE TO RETAILIATORY PERFORMANCE EVALUATION

My performance evaluation is in retaliation to answers to questions I provided to the recent EEO audit and my complaints about a hostile work environment. I am subject to disparate treatment and retaliation. I am a victim of sexism and racism.

I have complained to the General Counsel on numerous ocassions about the way people respond and react to the legal advice I give them and the way they react when I am placed in a position of authority. His reaction has been what do I expect him to do about it. In my performance evaluation, I am told that I create an unconfortable and confrontational environment. This comes after I have complained about numerous instances. I am told that I should be a better listener and be nicer. This is a stereotypical response to my demands for fair treatment. I am also told that I should be more of a team player. I am a team player. However, if I do not give someone the answer that they want to hear, than I am viewed as not being a team player. He can not point to any instance where I have given someone incorrect legal advice.

I am told that I should go out and look for work. This is disparate treatment. Randy and Charles, my co-workers are not told to go out and look for work. I am available to any person or department for legal advice and assistance. I was specifically told by John Poindexter that he did not like my comments to the DOE EEO auditors. I was told that I had

gotten the company in trouble. The negative evaluation on Judgment was specifically related to my response to the EEO audit. There were no other instances that were pointed out to me. I told the truth and feel that I properly responded to the questions presented to me. I can back up anything that I said. I feel that to evaluate me based on my responses in this area or any other area is retaliation for my answers to the DOE EEO audit.

I was given a negative rating on control and Follow-Up. There is not one instance when I have not followed up on any project. I keep a Things to Do list and keep accurate records. There were no goals or targets provided to me. If there are any instances, I wish an opportunity to respond to them specifically.

I was given a negative rating on Perceptual and Analytical. The only instance that was pointed out to me was the Bell South Mobility issue. Randy and John worked this project. After it became a problem the file was turned over to me. I contacted Bell South Mobility and all of the employees involved. I drafted a payment agreement and showed it to John Poindexter. He told me that Carol Parrella did not want the DM employees to sign this agreement because the DOE employees could not be forced to sign the agreement. For weeks, I left messages on his voicemail and went into his office twice to further discuss this matter. Finally, he called Chuck Herring and they discussed the matter. No follow up was given to me. They were supposed to have a meeting with Carol Parella. This past week I went in again and discussed the matter again. I drafted a new agreement, followed up with Bell South Mobility. I have records of the phone calls. I even noticed a mathematical error on the bill and pointed it out

to John Poindexter and Bell South Mobility. The employees I spoke to and Bell South Mobility can verify that I spoke to them. Therefore, I cannot understand this low score. This was the only incident that was pointed out to me. I am told that I should reduce outside distractions. I am a member of several Boards. At no time has my work been behind. I give a one day response on most matters. I return all phone calls on the same day unless I am out of town.

I am a member of the National Board of Directors of the American Corporate Counsel Association. This Board meets three times a year. This is a legal related activity. Any other organization would consider this an honor, but instead I am being criticized and ridiculed for my outside activities. I am a member of the Loyola Board of Visitors for the Business school. They meet in the morning for a breakfast meeting 2-4 times a year. Usually I am in the office by 9:00 A.M. Once a year they ask me to speak to the students at the school. I am a member of the Board of Directors of the Metropolitan Battered Womens Program. We meet at night. Once a year we honor the staff for lunch. I have been invited to speak at the ABA convention which will be held in New Orleans in August, 1994. I am on the ABA Steering Committee for the Minority In House Corporate Group. We meet once a year at the Convention on a week-end and all other meetings are held by conference call. ACCA also has conference call meetings. I have been unable to participate in those because John Poindexter said DM would not pay for the phone bill. The other members of the ABA steering committee pay for the calls to me. I document everything on my timecard. I was asked to participate in the local ABA EEOC luncheons. This is free, at lunch time various speakers speak to us about new labor topics and update us on new areas of the law. I

was told to cut back on these. I was specifically told that I have more activities than he and Randy combined. The activities which take me away from the office during daytime hours are legal related and increase my knowledge of the law. What amazes me is that my interpersonal skills can't be that bad since I am constantly asked to participate in these activities. I was nominated by the local chapter after having served as Vice-President and President for two years of the chapter. Loyola renominated me to serve on the Board. The ABA called me from Chicago and asked me to speak.

Finally, I wish to comment on the EEO audit. I was in my office. John Poindexter called me into his office. Three people from DOE were seated there. I did not know what was going on. They asked if I wanted John to leave. I said No because as far as I am concerned I had nothing to hide. I thought that they were the 401K auditors because Kim Kerr could not have lunch with me the day before because she was tied up with the auditors. After they identified themselves, I realized that this was something different. Nothing I said had not been said before to John Poindexter.

I wish to deal with one instance specifically. The complaint of Becky R. regarding Brian S. I interviewed Becky and looked at the documentation and wrote a response. I specifically asked John Poindexter if I could speak to Eugene T. and Brian S. I was told No. I turned the letter over to him. I never heard a response. In the performance evaluation meeting, he told me he spoke to Brian S. privately. This is an example of diparate treatment. Brian S. can get a private consultation about something that was documented, but, yet, I am asked to listen more and improve my interpersonal relationships with other employees in writing in a performance

evaluation. What claims have been stated against me? Why have not my cries and pleas for fair treatment been heard. I complained to my supervisor many times. I am a victim of disparate treatment, a hostile work environment and I have been retaliated against because I spoke up and voiced my concerns and complaints. I have much more but I will stop now. However, I wish the opportunity to defend my positsion and specifically answer any rumours, allegations or complaints against me. This document was written under tremendouse stress because I am very upset over this performance evaluation.

/s/ Kordice M Douglas

APPENDIX E

DynMcDermott Petroleum Operations Company
Strategic Petroleum Reserve

John A Poindexter
General Counsel

10102-JAP-94-0169
August 15, 1994

Lansen Barrow, Esq.
Office of Chief Counsel
United States Department of Energy
Strategic Petroleum Reserve
FE-441
900 Commerce Road East
New Orleans, Louisiana 70123

Dear Mr. Barrow:

Subject: Contract No. DE-AC96-93PO18000
Termination of Kordice M. Douglas

Reference: Letter from L. Barrow (DOE) to P. Turner (DM Human Resources), dated 8/11/94, subject: same

Following is DynMcDermott Petroleum Operations Company's (DynMcDermott) response to the allegations of Ms. Kordice M. Douglas as contained in her July 14, 1994, letter to Secretary O'Leary.

Ms. Douglas was not terminated due to comments made by her during the EEO audit interview. This is clearly indicated in the documentation furnished by Ms. Douglas. The EEO audit interview occurred on June 8, 1994. On June 22, 1994, the results of Ms. Douglas' Employee Performance Evaluation were discussed with her. Although Ms. Douglas had some areas that needed improvement, she was rated "Fully Satisfactory".

The evaluation of Ms. Douglas did focus on her conduct during the EEO audit interview. Specifically, she was told that the comments she made during the inteview were not responsive to the questions asked and that she did not exercise good judgment as an attorney by bringing up allegations against the company without first discussing the matter with her direct supervisor who is also the chief legal officer of the company. In addition, Ms. Douglas referenced specific legal matters to the audit interview team, which was confidential information that she had a legal and ethical obligation not to disclose to third parties.

Ms. Douglas was terminated due to the fact that on the very next day, June 23, 1994, she published the five page "Response to Retailiatory (sic) Performance Evaluation" to persons outside of DynMcDermott. This response, which contained confidential business information of DynMcDermott, was a further example of poor judgment and unethical behavior on the part of Ms. Douglas.

In her continued appeal, she has further dsiplayed the same lack of professional ethics for which she was terminated by publishing sensitive legal documents to anyone who might listen to her. Such further violation leaves DynMcDermott

no option but to pursue legal remedies to cause these disclosures.

Ms. Douglas' termination did not involve sexism or racism to any degree. She was terminated because her violation of legal ethics created a condition in which she could no longer be entrusted with legal matters involving DynMcDermott.

The company policy regarding terminations as it relates to "Involuntary Termination of Employment", is as follows. The company's definition states that it is a discontinuation, through DynMcDermott's initiative, of the employer-employee relationship. Circumstances include discharge for cause or reduction in force. A copy of the termination policy can be provided in full text which outlines the parameters of severing employer-employee relationships. Moreover, it states that "the company reserves the right to terminate the employment of any employee at any time, with or without cause", and goes on to stipulate that DynMcDermott will not discriminate against any person.

The termination was immediate due to the seriousness of the ethical violations and the fact that DynMcDermott management lost confidence in Ms. Douglas' ability.

Should you need further clarification regarding this matrer, please contact the undersigned.

Sincerely,

/s/ John A. Poindexter
John A. Poindexter
General Counsel

(2)

No. 98-673

FILED
NOV 20 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

October Term, 1998

KORDICE M. DOUGLAS,

Petitioner,

versus

DYNMcDERMOTT PETROLEUM OPERATIONS COMPANY, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I.

STATEMENT OF THE CASE

A. Introduction.

The petition misstates some of the facts below and misconstrues both the Fifth Circuit's holding and those of other circuit courts that purportedly "conflict" with the opinion below.

Contrary to the petition's assertion, the Fifth Circuit clearly held that in-house counsel do not forfeit any rights to engage in activities protected under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.* and §1981. All the court held, in a narrow opinion, was that lawyers could not unilaterally disclose client confidences without making any attempt to preserve those confidences and then claim under Title VII that the disclosures were "protected activities."

Every Louisiana lawyer, upon admission to the Bar, takes an oath to "maintain the confidence and preserve inviolate the secrets of my client." This case involves a company's termination of its senior counsel who, both during the course of her employment and afterwards, deliberately revealed client confidences.

It is important to note what this case does not involve. The confidences revealed by the petitioner, Kordice Douglas, were not done to protect public safety; they were not done to protect against imminent bodily harm to any person or to the environment; and they were not done pursuant to a court order. Douglas made no attempt whatsoever to protect attorney-client confidential information.

None of the considerations of Rule 10(a) of this Court are met in the petition.

B. The petition misstates portions of the record below.

Because the petition mischaracterizes portions of the record below, it is necessary to set forth the facts in more detail than ordinarily would be required in an opposition. Douglas, an African-American female, held a position of great trust and was one of only three attorneys at DynMcDermott. DynMcDermott is a private corporation with more than 900 employees (Tr. V 22, pp. 573, 580) that manages and operates the country's Strategic Petroleum Reserve facilities, the nation's bulwark supply to preserve energy independence in times of national crisis. 42 U.S.C. §6201 *et seq*. Contrary to the petition's assertions (at p. 4), there can be no factual dispute that the Fifth Circuit was correct when it stated that the relationship between DynMcDermott and the Department of Energy "was purely contractual and at arm's length." *Douglas v. DynMcDermott Petroleum Operations Company*, 144 F.3d 364, 366 (5th Cir. 1998). This was a government contract concerning a vital defense project; the fact that DynMcDermott's only client was the D.O.E. does not alter the legal analysis. Douglas' sole employer was DynMcDermott. Douglas had no attorney-client relationship with the D.O.E.

Contrary to the implication in the petition (at p. 5) that Douglas was involuntarily ensnared in the June 6, 1994 meeting involving a review of the company's employment procedures between D.O.E. officials and John Poindexter, the General Counsel of DynMcDermott,

the record demonstrates that Poindexter called Douglas into the meeting and offered to have the D.O.E. employees meet privately with her (Tr. V.23, pp. 707-09); however, both Douglas and the D.O.E. employees assured Poindexter that he need not leave. Tr. V 21, p. 224; Tr. V 23, pp. 709.

Contrary to the petition's implication (at p. 5) that Poindexter's silence during the meeting represented acquiescence to Douglas' disclosures, the record is undisputed that Poindexter, although "horrified" by her statements, said nothing during the meeting for fear of overemphasizing these items and causing further damage to the company's confidential and privileged information. Tr. V 23, pp. 711-3.

The petitioner's statement of facts fails to mention that Douglas failed to follow the company's internal procedures for raising claims of sex and race discrimination, although she was the primary legal contact for the Human Resources department and was fully aware of the company's procedures.

Contrary to the implications in the petition (p. 8), the record clearly supports the Fifth Circuit's finding that "Douglas confirmed that the D.O.E. was *not* to treat the Response as a whistleblower complaint." 144 F.3d at 367, 373 (emphasis supplied); Tr. V 21, p. 409.

The petition fails to note that at no time did Douglas attempt to invoke court or administrative protections for the confidences she was revealing.

The petition omits mention of the detailed internal examination that occurred prior to Douglas' termination.

When it became apparent that she had disclosed confidential information in the five-page rebuttal she had sent to Mr. O'Neill of the D.O.E., DynMcDermott convened a termination board consisting of some of the company's highest officials: its President; its Director of Human Resources; its Deputy Project Manager; and its General Counsel. Tr. V 22, pp. 577-578. After several meetings, the Director of Human Resources recommended that she be terminated because, as the company's attorney, she had failed to maintain confidential information. Tr. V 22, pp. 578-79, V. 23 pp. 627-32, 662, 759-61. This recommendation was unanimously supported by the termination board because of her "continued violation of her responsibilities as an attorney." Tr. V. 23, pp. 759-763.

The petition further omits other actions Ms. Douglas took, after her termination, that continued to violate her obligations to protect confidences. As the Fifth Circuit noted (144 F.3d at 367), after her termination she not only forwarded her five-page letter to Congressman William Jefferson (D., La.) and to the head of the NAACP, she also sent a copy to Hazel O'Leary, Secretary of the Department of Energy, along with a package of the company's "private documents gathered from the company's legal files before she was discharged." *Id.*

It was only after all of these actions occurred that Douglas filed a complaint with the Equal Employment Opportunity Commission. As the Fifth Circuit noted, the "sole basis" of the complaint was that she "opposed practices made unlawful under Title VII." *Id.*

Contrary to the petition's assertions that the information disclosed by Douglas both before and after her termination were "routine business" matters (p. 7), the record is clear that what were revealed were client confidences (144 F.3d at 371); further, that issue is not before this Court. The petition does not brief this issue nor is it listed among the questions presented. Rather, the petition concedes that confidences were revealed and then attempts to argue that these revelations were protected under the Louisiana Rules of Professional Conduct.

II.

REASONS FOR DENYING THE WRIT

A. The petition misreads both the Fifth Circuit's opinion and the opinions of other circuit courts.

1. The Fifth Circuit's opinion does allow in-house counsel to engage in protected activities that are not accomplished through the unilateral and unprotected disclosure of client confidences.

The petition incorrectly contends that there is a split among circuits on the issue of protected activities. Douglas is simply wrong in reading the Fifth Circuit's ruling as requiring an in-house counsel (or, for that matter, any attorney) to forfeit rights under federal labor laws. The holding, rather, is that an attorney cannot be engaged in a "protected activity" if the sole basis of that assertion is the disclosure of client confidences. The Fifth Circuit was careful to point out it did "not gainsay in the least" the right of an attorney "under Title VII to oppose allegedly discriminatory practices by her employer," and it held

that an attorney does not "surrender her Title VII rights" when she becomes in-house counsel. 144 F.3d at 376.

The court also noted that conduct which "does not constitute a breach of the legal profession's ethically imposed obligations, but that nevertheless adversely impacts the employment relationship between an in-house counsel and her employer-client, remains subject to the balancing test . . . before it must be determined to be unprotected conduct under Title VII." 144 F.3d at 376, fn. 15.

The court went out of its way to point out that if an attorney is required to disclose confidences, "there are appropriate means . . . that limit the dissemination of the information disclosed," including *in camera* review by an appropriate tribunal, sealing the record, or the use of fictitious names. 144 F.3d at 375, fn. 12. *In camera* review is a procedure suggested by this Court when one seeks to assert that otherwise privileged documents should be disclosed under the crime-fraud exception. *U.S. v. Zolin*, 491 U.S. 554 (1989). The use of fictitious names is appropriate when a lawyer is attempting to use matters that are privileged or confidential in pursuing the lawyer's own claims. *Doe v. A Corporation*, 709 F.2d 1043 (5th Cir. 1983).

The Fifth Circuit's opinion below is circumscribed; an attorney cannot "oppose the allegedly unlawful practices of her employer-client and . . . do so in a manner that violates the ethical duties of the profession." 144 F.3d at 376. This is entirely consistent with opinions of the Fifth Circuit and other courts that allow in-house attorneys to maintain private actions against their employers as long as they do not result in the unilateral and unprotected

revelations of confidential or privileged communications. *See, e.g., Doe, supra; Jones v. Flagship International*, 793 F.2d 714 (5th Cir. 1986), *cert. den.*, 479 U.S. 1066 (1987).

2. The opinion of the Third Circuit is not in conflict with the holding below.

The petition wrongly asserts that the opinion below conflicts with *Kachmar v. SunGard Data Systems, Inc.*, 109 F.3d 173 (3rd Cir. 1997). The issue in *Kachmar* arose pursuant to a "motion to dismiss and/or partial summary judgment" (109 F.3d at 177); there was no allegation that the protected activity of the in-house counsel consisted of disclosure of client confidences to third parties. Indeed, the protected activities consisted of internal communications to the client's own employees and officers. *Kachmar* merely held that in-house counsel do not forfeit Title VII's protection merely because they are attorneys. *Id.* at 186. This holding is congruent with the Fifth Circuit's ruling here. An attorney does not forfeit rights under Title VII simply because she is a licensed lawyer; however, she may not seek Title VII protections for activities that consist of "unethical conduct" (144 F.3d at 376) violating the rules of the legal profession.

3. The Fifth Circuit's opinion on the balancing test is not in conflict with the holdings of other circuits.

The petitioner misreads five cases in an attempt to create a conflict among the circuits where none exists. Not a single one of the cases cited by the petitioner

reaches any holding that is inconsistent with the Fifth Circuit's opinion.

The petitioner implies that the rulings of *Hochstadt v. Worcester Foundation for Experimental Biology*, 545 F.2d 222 (1st Cir. 1976); *Hicks v. ABT Associates, Inc.*, 572 F.2d 960 (3rd Cir. 1978); *Laughlin v. Metropolitan Washington Airports Authority*, 149 F.3d 253 (4th Cir. 1998); *Jennings v. Tinley Park Community Consolidated School District No. 146*, 796 F.2d 962 (7th Cir. 1986), and *O'Day v. McDonnell Douglas Helicopter Company*, 79 F.3d 756 (9th Cir. 1996), require that courts may not determine, as a matter of law, that a plaintiff has not met the requirements of the balancing test before finding that the employee (including an attorney subject to ethical constraints) is not engaged in a protected activity under Title VII. That implication is without merit.

The crucial distinction between these five cases and the petitioner's claim is that none of the cases involved an attorney who had a legal and ethical obligation to protect client confidences.[1] Thus, none stand for the proposition that Douglas asserts – that Title VII trumps the ethical and legal rules that bind all attorneys and that

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[1] All the plaintiffs in these cases had a complaint of retaliatory discharge. *Hochstadt* was a microbiologist complaining about a pay differential based on her sex; *Hicks* was a white male supervisor of housing evaluation operations complaining of race discrimination; *Laughlin* was a secretary to an airport manager; *Jennings* was a secretary of a school district superintendent complaining about a pay differential based upon her sex; and *O'Day* was an engineer for a helicopter company complaining of age discrimination.

mandate their protection of client confidences, secrets, and privileges.

It is notable that three of the cases, *O'Day*, *Laughlin* and *Hochstadt*, were summary proceedings in which the courts held, as a matter of law, that the allegations about being engaged in a protected activity could not legally outweigh the employer's legitimate interests. The courts in each of these three cases found, as a matter of law, that the plaintiff's activities were beyond the scope of Title VII's protections.[2] The Fifth Circuit's ruling does not create, as the petition contends (p. 16), a "third prong" to the balancing test; rather it merely recognizes that courts may rule as a matter of law that the employee's interests cannot outweigh certain other considerations. The Fifth Circuit's opinion comports with the approaches in *O'Day*, *Laughlin*, and *Hochstadt*. As flagrant as the plaintiffs' actions were in those cases,[3] they pale in comparison to Douglas' activities that violated both the legal and ethical duty she held as a professional attorney obligated to maintain her client's confidences.

The Fifth Circuit's ruling is not in conflict with these decisions. The Fifth Circuit expressly recognized and utilized the balancing test (144 F.3d at 373-376); it weighed

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[2] *O'Day*, 79 F.2d at 763-64; *Laughlin*, 149 F.3d at 260; *Hochstadt*, 545 F.2d at 230-34.

[3] *O'Day* stole sensitive company documents; *Laughlin* surreptitiously took documents out of her boss' desk, copied them, and sent them to another employee to use; and *Hochstadt* engaged in "bitter personal exchanges" (545 F.2d at 230) with her superiors, and took actions that "went beyond the scope of protected opposition," (*id.* at 233).

Douglas' rights under Title VII with her ethical duties as an attorney; and it determined "as a matter of law that conduct that breaches the ethical duties of the legal profession is unprotected under Title VII." *Id.* at 376.

B. There is no need for this Court to address the balancing test.

Petitioner asserts that this Court both should address whether the balancing test is the appropriate standard under Title VII and should decide whether the test ought to be applied to in-house counsel. These suggestions are without merit.

The Fifth Circuit did apply the balancing test here. There is no split in the circuits on whether or how the balancing test should be applied. There is no basis for this Court to review the decision below.

C. The petitioner was not within the scope of Rule 1.6(b)(2) when she unilaterally revealed client confidences.

The petitioner misreads Louisiana Rule of Professional Conduct 1.6(b)(2) when she suggests that this Rule condones and permits unilateral action by an attorney that reveals client confidences, without any attempt to maintain or protect those confidences.

Writings about attorney obligations are often couched in terms of "confidentiality" when the issue involves ethical questions and "privilege" when the issue

relates to evidentiary matters.[4] The duty to maintain confidences, however, is broader than the scope of legal privileges[5] and prevents an attorney from voluntarily revealing all information gained in the course of representing a client except: to advance the client's interests; or with the client's permission; or for certain other limited purposes.[6]

This Court has noted that client confidences are subject to extraordinarily high protection.[7] *Swidler & Berlin v.*

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[4] *See, e.g.*, Charles Wolfram, MODERN LEGAL ETHICS 242, 250-51, 297-99 (1986); Rust E. Reid, *et al.*, *Privilege and Confidentiality Issues When a Lawyer Represents A Fiduciary*, 30 REAL PROP. PROB. & TR. J. 541 (1996).

[5] *See Doe v. A Corp.*, 709 F.2d 1043, 1046 (5th Cir. 1983); *Brennan's, Inc. v. Brennan's Restaurants, Inc.*, 590 F.2d 168, 172 (5th Cir. 1979); *see also United States v. Ballard*, 779 F.2d 287, 293 (5th Cir. 1986), *cert. den.*, 475 U.S. 1109 (1986) ("[t]he evidentiary attorney client privilege exists apart from, and is not coextensive with, the ethical confidentiality precept."); *X Corp. v. Doe*, 805 F. Supp. 1298, 1307 (E.D. Va. 1992), *aff'd sub nom. Under Seal v. Under Seal*, 17 F.3d 1435 (4th Cir. 1994).

[6] *See* the ABA comments to Rule 1.6.

[7] *See also* Note, 80 YALE L.J. 317, 343 (1970), quoted with approval by Justice Stewart in his dissent in *Branzburg v. Hayes*, 408 U.S. 665, 726 (1972), a case involving whether reporters could be compelled to testify before a grand jury, " 'The newsman-informer relationship is different from . . . other relationships whose confidentiality is protected by statute, such as the attorney-client and physician-patient relationship. In the case of other statutory privileges, the right of nondisclosure is granted to the person making the communication in order that he will be encouraged by strong assurances of confidentiality to seek such relationships which contribute to his personal well-being. The judgment is made that the interests of society will be served when individuals consult physicians and lawyers; the

United States, ___ U.S. ___, 118 S.Ct. 2081, 141 L.Ed.2d 379 (1998) held that the right to preserve confidential communications survives even the client's death. Other courts, in the context of litigation between a terminated in-house attorney and the client, have been careful to stress the need for stringent protections of client confidences during the course of a suit. *See, e.g., Siedel v. Putnam Investments, Inc.*, 147 F.3d 7, 11 (1st Cir. 1998); *General Dynamics Corporation v. Superior Court*, 876 P.2d 487, 504 (Cal. 1994);[8] *GTE Products Corp. v. Stewart*, 653 N.E.2d 161, 167 (Mass. 1995). No court has ever suggested that a lawyer may disclose confidences outside of such a setting. As *Siedel* noted: " . . . our research has failed to unearth a single reported case from any jurisdiction in which an attorney has been permitted to use confidential information offensively when the attorney chafed at the client's criticism of his work (even if the attorney viewed that criticism as defamatory)." 147 F.3d at 11.

The danger of untrammeled disclosure of confidences is great, particularly, where (as here) the disclosure was made to a government agency. Even "voluntary" disclosure to government agencies in one context can waive a claim to privilege in future civil litigation: see the discussion of this issue in *Westinghouse v. Republic of the Philippines*, 951 F.2d 1414, 1423-24 (3rd

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public interest is thus advanced by creating a zone of privacy that the individual can control."

[8] Petitioner (at p. 22) misreads *General Dynamics* and fails to note its admonition that confidences are to be assiduously protected.

Cir. 1991). As Justice Douglas noted in *Russo v. Byrne*, 409 U.S. 1219, 1221 (1972), in speaking of privileges and the Sixth Amendment, but in a statement applicable here, the right to have counsel "obviously involves the right to keep the confidences of the client from the ear of the Government . . . "

There is no basis for the petitioner to assert that simply because she wants to make a "claim" under Title VII, this in and of itself frees her from any obligation to maintain confidences. If this were the case, Rule 1.6's prohibitions against revealing confidences would be rendered meaningless, for any attorney could disclose any confidence merely by couching it in terms of "a claim" in a controversy between lawyer and client. Rule 1.6 cannot be read so cavalierly as to permit lawyers to unilaterally waive confidences merely because they have a dispute with a client. As the Fifth Circuit held, an attorney has a right to assert Title VII's protections; however, she also has the ethical obligation to take appropriate actions to preserve her client's confidences in doing so. When she fails in this obligation, she cannot claim that her actions are within the scope of Rule 1.6.

CONCLUSION

Lawyers do not lose legal protections when they gain their law license; however, once they become part of the profession, they take on important legal and ethical responsibilities: paramount among these are their obligations to protect their clients' confidences, secrets, and privileges. When a lawyer is engaged in a dispute with a

client or former client, the lawyer should be free to pursue her claims in an appropriate forum. What she is not permitted to do, however, is to use the fact of the dispute to disclose confidences while making no effort whatsoever to protect those confidences from disclosure. There are numerous ways that lawyers can act ethically in such circumstances, including: seeking to file under seal the confidences allegedly needed to pursue the claim; disguising the names of all the parties; or invoking a proceeding and then seeking an *in camera* review of the documents to obtain a determination whether they are in fact confidential or privileged.

When a lawyer makes none of these efforts, Title VII is no haven. The decision below was correct legally. There is no split in the circuits. This case does not merit further review by this Court.

Respectfully submitted,

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NO. 98-673

(3)

Supreme Court, U.S.
FILED
DEC 23 1998
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In the Supreme Court of the United States

OCTOBER TERM, 1998

KORDICE M. DOUGLAS,
PETITIONER

VERSUS

DYNMCDERMOTT PETROLEUM
OPERATIONS COMPANY, ET AL
RESPONDENT

On Petition For Writ of Certiorari to The
United States Court of Appeals For
The Fifth Circuit

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

NOW INTO COURT comes Petitioner, Kordice M. Douglas (hereafter "Douglas"), and files a Reply to Respondents DynMcDermott Petroleum Operations Company (hereafter "DPO") and John Poindexter (hereafter "Poindexter")'s Brief in Opposition to Petition For Writ of Certiorari. DPO and Poindexter have made several arguments in opposition to the Petition which Douglas will now address.

I. Douglas Did Not Breach Her Ethical Duty to DPO Because DPO Contractually Waived its Rights of Confidentiality for Documents generated by DPO under its contract with DOE

The Fifth Circuit's obligation was to review the jury verdict under the standard of *Rhodes v. Guiberson Oil Tools,* 75 F. 3d 989, 993 (5th Cir. 1996) (en banc), which held that in a *McDonnell Douglas-Burdine* case, the jury verdict must be tested for sufficiency of evidence under the standard of *Boeing v. Shipman,* 411 F.2d 365 (5th Cir. 1969) (en banc). The panel instead, has breached that duty by disregarding the *McDonnell Douglas* framework, refusing to determine whether the jury could have reasonably found for the plaintiff based on the evidence it saw and heard. "The panel found the facts of the case *de novo,* and applied its own new mandatory rules of law to those facts." Judge Dennis's dissent, p. 24, filed on December 15, 1998 at *1998 WL 870350* (5th Cir 1998) (hereafter "Dennis Dissent"), which dissented from the majority opinion by Judge Jolly in *Douglas v. DynMcDermott Petroleum, 144 F3d 364* (5th Cir. 1998), filed on June 18, 1998. The dissenting opinion of Judge Dennis was joined by Judge Parker. Chief Judge Politz, Judges Benavides and Stewart would grant rehearing en banc to address the important and substantive issues identified in Judge Dennis's

dissent. Also in his dissent, Judge Dennis states:

> Instead of following controlling precedents, the panel opinion uses a free-wheeling, legislative-like balancing process to fashion a mandatory rule of law, viz., any employee who is a lawyer loses Title VII protection when she reveals any employment-related information while opposing an unlawful employment practice; and **proceeds to apply this rule to facts found by the panel itself** directly from the record, in complete disregard of the panel's duty to test the jury verdict under our *Boeing v. Shipman* standard as required by our en banc decision in *Rhodes*.

Dennis Dissent at 1 (emphasis added). As the District Court stated in its Order and Reasons, "The jury in this case was attentive and specific." Petition for Writ of Certiorari, Appendix B-5. The jury decided that Douglas was fired because of engaging in the protected activity of complaining about gender and race discrimination. However, both the panel opinion and DPO have set forth a different version of the facts.

Most importantly, DPO agrees with and emphasizes the panel's opinion that the Douglas violated her ethical duties to DPO. The panel in this case should not be making a fact determination that Douglas has breached her ethical duties to DPO because the jury has been given the evidence of the Louisiana Code of Professional Responsibility, considered all the evidence presented at trial, determined the credibility of the witnesses, and has reached the opinion that the company's explanation that Douglas breached an ethical duty was a pretext to retaliation under the *McDonnell Douglas-Burdine* analysis. There is sufficient evidence to support the jury verdict on this issue.

First, DPO asserts that Douglas improperly revealed

confidences. DPO states that "the petition concedes that confidences were revealed." However, the Petition (p. 7) clearly states (twice) that the subject matter of the Douglas's communications were routine business matters which "did not concern [or involve] any sensitive or confidential matter."

Under the *Boeing Company v. Shipman* standard, a jury verdict must be tested for sufficiency of the evidence. 411 F.2d 365 (5th Cir. 1969) (en banc). The most significant piece of evidence for whether Douglas revealed confidences of privileged information is the contract between DPO and DOE. As Circuit Judge Dennis pointed out in his dissenting opinion:

> The government's contract between the DOE and DPO provided that "**[a]ll records acquired or generated by the contractor [DPO] under this contract** in the possession of the contractor, including [performance appraisals, reviews, and associatd documents, equal employment opportunity and affirmative action claims and records, files and records concerning ethics and security investigations, and **attorney-client privilege or attorney work product] shall be subject to inspection, copying, and audit by the government at all reasonable times**[.]" "Emphasis added." Therefore, the DPO expressly waived its rights of confidentiality and privilege with respect to these documents.

Dennis Dissent, p. 3. The Fifth Circuit stated that the relationship between DOE and DPO was "purely contractual and at arm's length." This contract explicitly waived any rights of DPO of confidentiality and privilege with respect to the Response Letter of Douglas to her performance Evaluation, which was given to O'Neill of DOE.

Assuming, *arguendo,* that the substance of Douglas's

communication wth DOE constituted confidential information, DPO states that there is no exception under the bar rules which covers her conduct. Particularly, DPO states that Douglas "was not within the scope of rule 1.6 (b) (2) when she unilaterally revealed client confidences." Opposition, p. 10.

In light of the contract language, it is clear that Douglas did not "unilaterally" reveal anything. Rule 1.6 prohibits disclosure "unless a client consents after consultation." DPO is a sohisticated business entity with a lengthy contract which includes an explicit waiver of normally privileged information with respect to DOE.

In addition, Rule 1.6(b) allows a lawyer to make disclosures "to the extent the lawyer reasonably believes is necessary...(b) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client..." In *Doe v. A Corporation*, 709 F.2d 1043 (5th Cir. 1983), the court held that a lawyer does not forfeit her rights simply because to prove them she must utilize some confidential client information. The Fifth Circuit's interpretation of Rule 1.6 is in conflict with its own and other circuits' precedent.

> The panel opinion further disadvantages every Louisiana attorney having a dispute with any client by incorrectly interpreting [Rule 1.6] to require that the attorney must file a formal administrative or judicial complaint before there can be a "controversy" with the client that would allow the lawyer to reveal confidential information necessary to the enforcement or defense or the lawyer's own personal rights."

Dennis dissent, p. 34. When Douglas gave a copy of her Response Letter to O'Neill, the officer in charge of taking complaints of discrimination at the DOE, she was establish-

ing a claim of discrimination on her behalf because of the controversy between herself and DPO. The evidence is clear that the company fired her before she was able to consult with her attorney about whether the Response Letter was to be considered a whistle-blowing complaint. Judge Dennis writes:

> The panel opinion incorrectly and improperly finds de novo that "Douglas...specifically instructed O'Neill not to treat the Letter as a whistle-blower complaint." *Douglas*, 144 F.3d at 373. The panel's conclusion that Douglas's response letter did not constitute protected participation is thus based on a faulty factual premise. More important, the panel overlooks that "the focus is not on whether the employee intends to follow through with filing the charge, but rather on whether the employer's dicision to discharge was motivated by an improper desire to retaliate against an employee for pursuing rights granted by the Act." *Polk v. Yellow Freight Syst., Inc.*, 801 F.2d 190, 200 (6th Cir. 1981) (an employee's visit to a Civil Rights Commission to inquire about rights under the Act is a protected activity); see also *Gifford v. Atchison, Topeka & Santa Fe Ry.*, 685 F.2d 1149, 1156 n.3 (9th Cir. 1982) ("no legal distinction...between...filing of a charge...and threatening to file a charge.").

Whether or not the Response Letter was considered a whistle-blowing complaint, it was a complaint of retaliation, and race and gender discrimination.

It is most significant that **the trial court did not find that Douglas violated any ethical rule.** In fact, the district court judge stated:

> With respect to Bell South,...most of her explanation dealt with generic steps she took in handling the

> matter, with minimal disclosure of any substantive information. Likewise, her discussion of "Becky R." and "Brian S." did not discloses any substantive in-house information. It also related directly to the plaintiff's complaint that she was the victim of disparate treatment in her performance evaluation."

Petition, Appendix B-4. Therefore, the evidence was sufficient to support the finding of the jury that DPO and Poindexter had retaliated against Douglas for her engaging in activities protected by Title VII..

II. The Fifth Circuit Opinion Abandons the Balancing Test Used by the Majority of the Circuits.

The majority of the circuits use a balancing test when deciding whether a plaintiff's conduct is "protected activity" under Title VII. The Fifth Circuit cites this test in the panel opinion: "The employer's right to run his business must be balanced against the rights of the employee to express his grievances and promote his own welfare." Petition, Appendix A-22. The employer's interest wins out when the conduct is "so inappropriate as to justify the curtailment of statutorily-afforded relief." *Id.* at A-21-22.

The Fifth Circuit abandoned this test, in this case and in the future, when the plaintiff is an in-house attorney who has revealed **minimal** information about her client. While DPO states that the panel *did* use the balancing test in the instant case (p. 10), it is clear that if the employer's right to run his business was seriously weighed by the court against the right of Douglas to express her grievances, Douglas's rights would have prevailed.

Judge Dennis writes about the audit interview: "Significantly, no harm whatsoever to DPO resulted from

Douglas's statement. O'Neill and JoAnn Rochon, two DOE team members who testified at the trial, could not even recall that Douglas had said anything about a class action, human resources leeks, specific employees or specific employee complaints or cases." Dennis Dissent, p. 7. Judge Dennis further states that:

> Based on the evidence introduced at trial, the jury reasonably could have found that DPO's "ethical" reason for terminating Douglas's employment was in fact a pretext because: (1) The statements in Douglas's June 24, 1994 response that DPO proffered as its reason for discharging Douglas **were not in fact disclosures to DOE because DOE already had the information and it was insignificant anyway;** the jury reasonably could have disbelieved DPO because of this alone;...

Dennis Dissent, p. 28 (emphasis added). The employer's right to run its business was not jeopardized in any way. No harm came of Douglas's communication with DOE.

The other circuit cases which use the balancing test all include plaintiffs whose conduct was much more egregious than Douglas's. In both *Laughlin v. Metropolitan Washington Airports Authority,* 149 F.3d 756 (4th Cir. 1998), and *O'Day v. McDonnell Douglas Helicopter Co.,* 79 F.3d 756 (9th Cir. 1996), the plaintiffs stole sensitive company documents. In *Hochstadt v. Worcester Foundation for Experimental Biology,* 545 F.2d 222 (1st Cir. 1976), the plaintiff was extremely hostile and disruptive in the workplace, engaging in public, bitter exchanges with her superiors. DPO attempts to compare these activities with that of Douglas, stating (p. 9 of Respondents' Brief in Opposition) that "they pale in comparison to Douglas' activities..." This argument is disingenuous considering the contract language that waived

DPO's rights of confidentiality and privilege with respect to Douglas's performance Evaluation and her Response letter.

DPO also asserts that the panel did not add a third prong to the test when it comes to lawyers (p. 9). However, the language in the panel opinion is as follows:

> [W]hen an **attorney's Title VII right** to oppose her employer-client's allegedly discriminatory practices by disclosing confidential information contrary to the ethical obligations of the profession is balanced against her **employer-client's rights** to ethical representation and the **profession's interest** in assuring the ethical conduct of its members, the employer's and the profession's interests must prevail.

Petition, Appendix A-28. The panel adds the interest of the entire legal profession to the equation, on the side of the employer. It is hard to conceive of a situation where the employee's interest would outweigh the other two. To summarize the Fifth Circuit's manipulation of the balancing test:

> [T]he panel transformed the balancing test into four overlapping hard-and-fast rules of law: (1) An attorney-employee's opposition to an unlawful employment practice that involves a breach of a state ethical rule imposing a duty for the benefit of a client is unprotected under Title VII; (ii) The magnitude of the attorney's transgression and the risk of harm created are not relevant; "any betrayal of a client's confidences that breaches the ethical duties of the attorney places that conduct outside Title VII's protection [against retaliatory discrimination by the employer]" *Id.* at 376; (iii) If the attorney-employee's opposition conduct invoves a violation of a professional ethical rule, "the employer is insulated from liability

> irrespective of whether it took adverse employment action because the conduct constituted a breach or because the conduct was in opposition to discriminatory employment practices." *Id.* at 377 n.16; (iv) Consequently, the employer in such a case is entitled as a matter of law to a judgment as a matter of law dismissing the employee's case. *Id.* at 376.

Dennis Dissent, p. 26.

This transformation is so far away from the normal balancing test used by the majority of the circuits, it is necessary for this court 1) to decide how the balancing test can be applied in a manner consistent with the *McDonnell Douglas-Burdine-Hicks* burden of proof analysis, 2) to articulate exactly what interests should be considered in the balancing test, and 3) to decide whether this test should be completely disregarded for attorneys who reveals any employment-related information while opposing an unlawful employment practice.

III. Conclusion

For all of the foregoing reasons, Petitioner Kordice M. Douglas, urges this Honorable Court grant her application for writ of certiorari; that the Clerk of the U.S. Fifth Circuit Court of Appeals be requested to certify and transmit the record in No. 96-30883, "Kordice M. Douglas v. DynMcDermott Petroleum Operations Company and John Poindexter", that a briefing schedule be set, and that after all due proceedings are had herein, the judgment of the U.S. Fifth Circuit of Appeals be reversed and the jury verdict and judgment of the district court be reinstated.

Respectfully submitted,

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NO. 98-673

Supreme Court, U.S.
FILED
DEC 28 1998
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1998

KORDICE M. DOUGLAS,
PETITIONER

VERSUS

DYNMCDERMOTT PETROLEUM OPERATIONS COMPANY, ET AL
RESPONDENT

On Petition For Writ of Certiorari to The United States Court of Appeals For The Fifth Circuit

PETITIONER'S SUPPLEMENTAL BRIEF

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PETITIONER'S SUPPLEMENTAL BRIEF

Kordice M. Douglas ("Douglas") respectfully submits her Supplemental Brief pursuant to Supreme Court Rule 15.8 because on December 15, 1998, the United States Court of Appeals for the Fifth Circuit issued a dissenting opinion in this case by Judge Dennis, joined by Judge Parker, *1998 WL 870350 (5th Cir 1998).* (hereafter "Dennis Dissent"), which dissented from the majority opinion by Judge Jolly in *Douglas v. DynMcDermott Petroleum, 144 F3d 364 (5th Cir. 1998),* filed on June 18, 1998. In addition to the joining of the dissent by Judge Parker, Chief Judge Politz, Judges Benavides and Stewart would grant rehearing en banc to address the important and substantive issues identified in Judge Dennis's dissent. The Dennis Dissent is attached hereto as Appendix A. This brief will address how the dissenting opinion supplements and enhances Petitioner's Petition for Writ of Certiorari.

I. ADDITIONAL FACTS

Judge Dennis's learned and well researached dissent has brought to light facts in this case that should be highlighted and emphasized.

A. Douglas Testified Truthfully at the EEO Audit.

In the aftermath of the impeachment of President William Jefferson Clinton for perjury and obstruction of justice, Douglas should be praised and not fired for truthfully answering the questions of the EEO auditors.

According to Douglas's testimony, she testified truthfully and to the best of her knowledge and understanding. Poindexter had not forewarned Douglas of this audit, and only called her into the audit when he could not answer some

questions about the audit. Although Douglas later found out that Poindexter was disappointed and embarrassesd with her answers, they were truthful. Dennis Dissent, p. A-6.

B. By Contract DynMcDermott Waived its Rights of Confidentiality and Privilege with Respect to Douglas's Performance Appraisal and Response Letter.

The EEO Audit conducted by Department of Energy (DOE) of DynMcDermott Petroleum Operations(DPO)'s EEO programs, conducted pursuant to Executive Order No. 11246, consisted of a review of DPO documents and an interview of randomly selected DPO employees.

The government's contract between the DOE and DPO provided that "[a]ll records acquired or generated by the contractor [DPO] under this contract in the possession of the contractor, including [performance appraisals, reviews, and associated documents, equal employment opportunity and affirmative action claims and records, files and records concerning ethics and security investigations, and attorney-client privilege or attorney work product] shall be subject to inspection, copying and audit by the government at all reasonable times[.]" Douglas's Response to her Performance Evaluation was a document that DPO had waived, by contract, its rights of confidentiality and privilege. Dennis Dissent p. A-5.

C. No Harm to DPO Resulted from Douglas's Statements.

O'Neill and Rochon testified at trial that they could not recall that Douglas had said anything about a class action, human resources leaks, specific employees or specific employee complaints or cases. The Lansen Barrow, a DOE attorney and the third member of the audit team, testified that he could not recall Douglas commenting on specific

employees or cases. According to O'Neill, the DOE team told Douglas that some of the female employees they had interviewed believed that they were not paid on an equal basis with men, although they had not filed any claims, and asked if she had any knowledge of that. Although he could not recall exactly what she said, he stated that Douglas's "response indicated to me that it either was a personal issue or a real — something she was quite interested in." Dennis Dissent p. A-8. there is no testimony that any of Douglas's comments in the EEO audit harmed DynMcDermott in any way.

D. Poindexter statement to Douglas showed motivation for retaliation against her.

According to Douglas, Poindexter, at the meeting to discuss her performance evaluation, said, "Kordice, I know you're going to think I'm being hard on you and I probably was, but during the audit you made me look stupid and got the company in trouble." Dennis Dissent p. A-8.

E. The Jury Was Instructed on the Louisiana Rules of Professional Conduct.

The court instructed the jury on the Louisiana Rules of Professional Conduct, one of which prohibits a lawyer from revealing information relating to representation of a client except to the extent the lawyer reasonably believes it necessary to establish a claim or defense in behalf of the lawyer in a controversy between the lawyer and the client or to respond to allegations in any proceeding concerning the lawyer's representation of the client. Dennis Dissent pgs. A-11, A-12.

II. THE PANEL OPINION ATTEMPTS TO OVERRULE THE *MCDONNELL DOUGLAS-BURDINE-HICKS* LINE OF DECISIONS.

Douglas has been denied the opportunity to prove

that the proffered reason given by DynMcDermott for the termination was a pretext for retaliation for participating in a protected activity. The panel opinion has created a new rule of law that for employees who are attorneys, their case can be decided on issues of legal ethics and not under the burden shifting order of proof under the *McDonnell Douglas-Burdine-Hicks*[1] line of cases. the panel opinion announces several broad mandatory rules of law. First, it "hold[s] as a matter of law that conduct that breaches the ethical duties of [her state's] legal profession is unprotected under Title VII." Douglas, 144 F.3d at 376. Second, "[A]ny betrayal of a client's confidences that breeches the [state] ethical duties of the attorney[, including a "minimal disclosure of any substantive information,"] places that conduct outside Title VII's protection." *Id.* Third, "So long as the [attorney-employee's] conduct actually constituted a violation of the profession's ethically imposed duties, the employer is insulated from liability irrespective of whether it took adverse employment action because the conduct constituted a breach or because the conduct was in opposition to discriminatory employment practices." *Id.* at 377 n.16, (underscoring added by Judge Dennis). Fourth, the defendant is entitled to the entry of a judgment as a matter of law dismissing the plaintiff's case, if the Plaintiff's opposition conduct involved a breach of her state's ethical rule. *Id.* at 376. It is self-evident, however, that none of the panel's new rules of law can be reconciled with the Supreme Court's McDonnell Douglas line of cases. Dennis Dissent p.16. Douglas is not allowed to prove that the company's reasons for her termination are a pretext for retaliation.

In the U.S. Supreme Court *McDonnell Douglas v. Green,*

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[1] *McDonnell Douglas v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973); *Texas Dept. of Community Affairs v. Burdine*, 459 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981). *St. Mary's Honor Ctr. v. Hicks* 500 U.S. 502, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993).

the Plaintiff had pleaded guilty to the deliberately unlwful and potentially very harmful activity of participating in a "stallin" to block access and egress to defendant's plant. The Supreme Court held that while "[n]othing in Title VII compels an employer to absolve and rehire one who has engaged in such deliberate, unlawful activity against it[,] . . . neither does it permit [the employer] to use [the employee or applicant's] conduct as a pretext" for unlawful discrimination prohibited by Title VII. *McDonnell Douglas,* 411 U.S. at 803-04.

Judge Dennis in his dissesnting opinion, states that because Douglas is denied her ability to show that the employer's decision to fire her because of ethical violations was in reality a pretext for retaliation, the panel decision violates the principles of *McDonnell Douglas-Burdine.* "the rules of law announced by the panel opinion to the effect that an attorney-employee's unethical conduct, per se and as a matter of law, places the employee's opposition to unlawful employment practices outside the protection of Title VII are manifestly contrary to the Supreme Court decisions and our own en banc decision." (En banc decision referring to the *Rhodes* decision) Dennis Dissent pps. A-17—A-18.

III. DOUGLAS DID NOT BREACH HER ETHICAL DUTY TO DPO BECAUSE DPO CONTRACTUALLY WAIVED ITS RIGHTS OF CONFIDENTIALITY FOR DOCUMENTS GENERATED BY DPO UNDER ITS CONTRACT WITH DOE.

As Circuit Judge Dennis pointed out in his dissenting opinion:

> The government's contract between the DOE and DPO provided that "**[a]ll records acquired or generated by the contractor [DPO]** under this contract in the possession of the contractor, including [performance appraisals, reviews, and associated

> documents, equal employment opportunity and affirmative action claims and records, files and records concerning ethics and security investigations, and **attorney-client privilege or attorney work product] shall be subject to inspection, copying, and audit by the government at all reasonable times[.]"** Therefore, the DPO expressly waived its rights of confidentiality and privilege with respect to these documents.

Dennis Dissent, P. A-5. the Fifth Circuit stated that the relationship between DOE and DPO was "purely contractual and at arm's length." this contract explicitly waived any rights of DPO of confidentiality and privilege with respect to the Response Letter of Douglas to her Performance Evaluation, which was given to O'Neill of DOE. Therefore, Douglas did not engage in unethical behavior because the contract between DPO and DOE gave DOE the right to review even attorney client privileged and attorney work product documents from DPO.

IV. THE PANEL OPINION MISINTERPRETS RULE 1.6.

"The panel opinion, by holding that Louisiana State Bar Association Rule of Professional Conduct 1.6 provides that a lawyer-employee cannot have a controversy with, or claim or defense against, her client, which would allow the attorney to reveal confidential information to the extent necessary to enforce or defend the attorney's own personal rights, until the lawyer files a formal judicial or administrative petition against the client, incorrectly interprets the rule and further undermines every attorney's access to courts for the vindication of personal rights and claims.

The panel opinion cites no authority and provides no reason for its eccentric reading of the rule." Dennis Dissent p. A-35.

On the contrary, Judge Dennis in his dissent cites the Model Rules of ProfessionalConduct Rule 1.6 cmt.18 (1983) for the proposition that paragraph (b) (2) of Rule 1.6 provides that an attorney's right to respond to charges of misconduct arises when an assertion has been made and the rule does not require the attorney to wait for the commencement of an action or proceeding. A reading of Rule 1.6 (b) (2) according to the panel decision would have a chilling effect upon the enforcement of an attorney-employee's federal constitutional rights. Therefore, even if the information disclosed by Douglas was confidential and even if that confidentiality had not been waived by contract, Douglas had the right to disclose the information that she did in the Response letter because she had a right under Rule 1.6(b) (2) to bring a claim in her defense and in so doing, disclose information necessary to the evaluation, protection and enforcement of her legal rights. Dennis Dissent p. A-36.

CONCLUSION

For all of the foregoing reasons, Petitioner Kordice M. Douglas, urges this Honorable Court grant her application for writ of certiorari; that the Clerk of the U.S. Fifth Circuit Court of Appeals be requested to certify and transmit the record in No. 96-30883, "Kordice M. Douglas v. DynMcDermott Petroleum Operations Company and John Poindexter", that a briefing schedule be set, and that after all due proceedings are had herein, the judgment of the U.S. Fifth Circuit of Appeals be reversed and the jury verdict and judgment of the district court be reinstated.

Respectfully submitted,

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REVISED, December 16, 1998

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-30883

FILED
DEC 15 1998

KORDICE M. DOUGLAS,
Plaintiff - Appellee-Cross-Appellant,

versus

DYN McDERMOTT PETROLEUM OPERATIONS COMPANY, JOHN POINDEXTER,
Defendants - Appellants-Cross-Appellees.

Appeals from the United States District Court for the Eastern District of Louisiana

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC
144 F.3d 364 (5th Cir. June 18, 1998)

Before JOLLY, DAVIS, and BARKSDALE, Circuit Judges.

PER CURIAM:

The order of July 23, 1998, denying rehearing and rehearing en banc is rescinded and this order is substituted in its place.

The petition for rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor, the suggestion for rehearing en banc is also DENIED.

BENAVIDES, Circuit Judge, with whom POLITZ, Chief Judge and Stewart, Circuit Judge, join, dissenting:

I would grant rehearing en banc to allow the en banc court tao address the important and substantive issues identified in the dissent filed by Judge Dennis.

DENNIS, Circuit Judge, with whom PARKER, Circuit Judge, joins, dissenting.

I dissent from the refusal to rehear this case en banc.

The panel opinion clashes with the Supreme Court's *McDonnell Douglas-Burdine-Hicks*[1] framework for the trial of Title VII intentional discrimination cases, as well as our en banc adoption and explanation of the framework in *Rhodes v. Guiberson Oil Tools*, 75 F.3d 989 (5th Cir. 1996) (en banc). Instead of following controlling precedents, the panel opinion uses a free-wheeling, legislative-like balancing process to fashion a mandatory rule of law, *viz.*, any employee who is a lawyer loses Title VII protection when she reveals any employment-related information while opposing an unlawful employment practice; and proceeds to apply this rule to facts found by the panel itself directly from the record, in complete disregard of the panel's duty to test the jury verdict under our *Boeing v. Shipman*[2] standard as required by our en banc decision in *Rhodes*. The panel opinion also overrules or undermines prior panel decisions in *Doe v. A Corporation*[3], which held that ethical rules cannot be asserted to preclude a lawyer's access to courts for the adjudication of his personal rights and tenable legal claims against his former employer, and *Jones v. Flagship*[4] which expressly recognized a lawyer's right to pursue her own personal Title VII claim against her employer and to have a full and fair opportunity under the

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[1] *McDonnell Douglas v. Green*, 411 U.S. 792 (1973); *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993).

[2] *Boeing Co. v. Shipman*, 411 F.2d 365 (5th Cir. 1969) (en banc), *overruled in part on other grounds, Gautreaux v. Scurlock Marine, Inc.*, 107 F.3d 331 (5th Cir. 1997) (en banc).

[3] *Doe v. A Corp.*, 709 F.2d 1043 (5th Cir. 1983).

[4] *Jones v. Flagship Int'l*, 791 F.2d 714 (5th Cir. 1986), *cert. denied*, 479 U.S. 1065 (1987).

McDonnell Douglas-Burdine framework to demonstrate that the employer's proffered reasons for adverse employment actions were a pretext for unlawful discrimination.[5]

I will set forth my understanding of the case and the reasons that I believe a correct application of the statute and the doctrine of stare decisis should not result in setting aside the jury's verdict for the plaintiff or a reversal and remand for entry of a judgment of dismissal.

I. STATEMENT OF THE CASE

Kordice Douglas, a black woman, was an in-house attorney-employee of DynMcDermott Petroleum Operations Company (DPO). DPO was a government contractor performing services for the Department of Energy (DOE).

Between April 13 and July 18, 1994, the DOE conducted an appraisal of DPO's Equal Employment Opportunity /Affirmative Action program to assure that DPO was complying with Federal EEO laws. The DOE appraisal was authorized by the DOE-DPO government contract; Executive Order No. 11246, as amended, *reprinted* as amended in 42 U.S.C. § 2000(e) note; 41 C.F.R. § 60-1 *et seq.*; FAR 52-222-26; DOE Order No. 3220.2A. The appraisal consisted of a review of DPO documents and interviews with a randomly selected group of DPO employees.[6]

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[5] The panel opinion also incorrectly interpret a Louisiana State Bar Association Rule of Professional conduct 1.6 to require the filing of a formal complaint by a lawyer in an administrataive or judicial tribunal against her client in order for there to be a recognizabale controversy with the client that would allow the lawyer to reveal confidential information when it is necessary to do so to enforce or defend her own personal rights or to defend herself against an accusation of wrongful conduct.

[6] In preparation for the appraisal, DOE requested DPO to complete a questionnaire and turn over certain of its documents. Among the documents requested were: "List of EEO-related complaints and disposition actions(s)

The government's contract between the DOE and DPO provided that "[a]ll records acquired or generated by the contractor [DPO] under this contract in the possession of the contractor, including [performance appraisals, reviews, and associated documents, equal employment opportunity and affirmative action claims and records, files and records concerning ethics and security investigations, and attorney-client privilege or attorney work product] shall be subject to inspection, copying and audit by the government at all reasonable times [.]" Therefore, DPO expressly waived its rights of confidentiality and privilege with respect to these documents.[7]

On June 8, 1994, during the appraisal, the DOE appraisal team met with John Poindexter, who was DPO's general counsel and Douglas's supervisor. Douglas was not scheduled or prepared to attend the meeting. After the meeting was underway, however, Poindexter sent for Douglas and instructed her to answer some questions for the DOE team. Poindexter did not apprise Douglas of the questions she would be asked or how she should answer them. According to Douglas, she resonded to all of the questions by the DOE team honestly and correctly to the best of her knowledge and understanding. DOE auditors O'Neill, Barrow and

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footnote 6 continued

taken since contract inception (including those actions pending after taking over from Boeing Petroleum Services, Inc.)"; "Job group summary by race and sex as of October, 1993 and March, 1994") and "Organizational charts by pay code, race, sex [,]"

[7] The statement to the contrary in DPO's brief is incorrect: "the controlling contract neither required DynMcDermott to waive any rights of confidentiality or privilege, nor did it give DOE an unlimited right to seek or obtain confidential or privileged information from DynMcDermott." The related statement in the panel opinion is misleading; "DynMcDermott neither implicitly nor explicitly waived any of its rights of confidentiality or privilege with respect to its in-house counsel." *Douglas v. DynMcDermott Petroleum Operations Co.*, 144 F.3d 364, 366 (5th Cir. 1998) (No. 98-673.

Rochon also testified at trial that Douglas's answers were responsive to their questions. Unbeknownst to Douglas, Poindexter had called her into the meeting because he could not answer some of the DOE team's questions about his own office's procedures. When team member Dick O'Neill asked her several questions touching on more substantive EEO matters, however, she also answered them truthfully and accurately within her understanding. Douglas testified that she later learned that Poindexter, who sat by silently and impassively during her interrogation, was disappointed and embarrassed by several of her responses. It may be fairly inferred that Poindexter, who was already embarrassed by his inability to answer procedural questions, was further upset because Douglas's unrehearsed answers were in some respects inconsistent with his understanding of circumstances involving DOE's EEO program that he wished to present to the DOE team.[8]

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[8] These questions and answers, Douglas testified, were as follows:

> [O'Neill] said, "Kordice, we're conducting the audit. We've received a lot of complaints at DOE and that's why we're conducting the audit." He said, "Were you aware of all these complaints?" So I said, "No, I'm not aware of all the complaints. What complaints are you talking about?;; So he said, "We've had a number of people to complain." I said, "Well," I said, "If you have all those people complaining, it's just a class action wait[sic] to happen." And I said, "No, I'm[sic] wasn't aware that you had that many employees complaining."

These statements were repeated without change in substance during her testimony.

> [O'Neill] said, "Were you aware of the women at the sites with the equal pay claim?" So I said, "No, I'm not aware of any equal pay claim with the women at the sites," but, I said, "I'm well aware of the equal pay situation." And I said, "Maybe I'll get my money now," something jokingly, and they just smiled and went on to the next question.

* * *

Significantly, no harm whatsoever to DPO resulted

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footnote 8 continued

> They also asked me was I aware of the leaks in the human resources department. They had many complaints from employees about leaks in the human resources department, and I took up for the human resources department. I told them that it was unfair to criticize the human resources department, when employees were going back to their desks discussing the problem. And I specifically mentioned an employee, Becky S., even though I didn't call her name in the interview, and that she was standing out in the hall, telling people about their problems.

Poindexter recalled Douglas's responses to the questions of the DOE appraisal team somewhat differently. According to Poindexter:

> Well, they started asking her specific details about certain situations . . . . We had a situation where some women employees at one of the sites, who were performing exactly the same task as the men, were being paid less, and that was brought to our attention . . . . DynMcDermott had resolved it. We, in fact, increased the salary of the women because it was a legitimate complaint. So she started explaining that issue — I mean, they were asking her what she knew about an equal pay situation at the sites, and she said, well, she really didn't know. And they looked at me and they said, "Do you know about that?" And I said, "Yes." Mr. Turner had talked to me about the situation and I was aware of it. But when they asked her is when she gave the statement, "No, I don't know about it, but maybe I'll get my money now."
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> There was another problem with regard to leaks in the HR department, and she responded to the leaks in the HR department. Then the issue that came up was — I don't really remember how it came up, but the subject was does she think the employees were satisfied with resolution of EEOC complaints. At that point in time, is when she went into her explanation of, "No, but I'll tell you what. We have these plaintiffs' attorneys coming into contact with our employees, and they're just a class-action lawsuit waiting to happen."

from Douglas's statements. O'Neill and JoAnn Rochon, two DOE team members who testified at the trial, could not even recall that Douglas had said anything about a class action, human resources leaks, specific employees or specific employee complaints or cases. Lansen Barrow, another DOE attorney on the audit team, testified tht he could not recall Douglas commenting on specific employees or cases. According to O'Neill, the DOE team told Douglas that some of the female employees they had interviewed believed that they were not paid on an equal basis with men, although they had not filed any claims, and asked if she had any knowledge of that. Although he could not recall exactly what she said, he stated that Douglas's "response indicated to me that it either was a personal issue or a real — something she was quite interested in."

On June 22, 1994, after two weeks' silence and without previous notice, Poindexter called Douglas into his office and handed her her first written performance evaluation as a DPO employee. According to Douglas, Poindexter said, "Kordice, I know you're going to think I'm being hard on you and I probably was, but during the audit you made me look stupid and got the company in trouble." The evaluation was critical of Douglas's judgment during the DOE's EEO appraisal. Poindexter gave Douglas a rating of "Improvement Needed" under the "Judgment" category of the performance evaluation, and at Douglas's request, Poindexter agreed to add the handwritten notation "EEO Audit" next to the poor rating. Poindexter also commented in the written evaluation that Douglas needed to "focus on issues when dealing in audits and interviews." Poindexter also gave Douglas an "Improvement Needed" rating under the category "perceptual and Analytical," and at Douglas's request, added the handwritten notation "Bell South" next to the poor rating. Douglas testified that during her evaluation Poindexter told her that he and Jocelyn Guarisco, DOE chief counsel, had

discussed Douglas's statements during the meeting with the DOE team. According to Douglas, Poindexter also said that he and Guarisco had decided that she had committed a breach of professional ethics but would not explain the exact nature of the violation. The evaluation resulted in an overall rating of "Fully Satisfactory," which Douglas perceived to be a severely harmful downgrading because it was only one grade above the lowest rating and two grades below the top grade of "Excellent," which she thought she deserved and needed to maintain as a professional employee.

Because Douglas perceived the performance evaluation rating to be the result of sexual, racial and retaliatory discrimination, she filed a written "Response To Retaliatory Performance Evaluation" on June 24, 1994, complaning of alleged unlawful employment practices. She sent the written response to Poindexter, other DPO executives, and O'Neill who was DOE's EEO whistle-blower officer designated to receive EEO complaints from DPO employees and forward those complaints to the EEOC. In the response she made two statements that DPO contends were disclosures of the confidences of her employer-client, DPO, to a third person, *viz.*, Dick O'Neill, as follows:

> I was given a negative rating on Perceptual and Analytical. The only instance that was pointed out to me was the Bell South Mobility issue [-- concerning the problem of the personal use of DPO cellular phones by DPO and DOE employees]. Randy [another DPO in-house attorney] and John worked this project. After it became a problem the file was turned over to me. I contacted Bell South Mobility and all of the employees involved. I drafted a payment agreement and showed it to John Poindexter. He told me that Carol Parrella did not want the DM

> [DPO] employees to sign this agreement because the DOE employees could not be forced to sign the agreement. . . . Finally, he called Chuck Herring [DPO vice-president and deputy project manager] and they discussed the matter. No follow up was given to me . . . I drafted a new agreement, followed up with Bell South Mobility. I have records of the phone calls. I even noticed a mathematical error on the bill and pointed it out to John Poindexter and Bell South Mobility. The employees I spoke to and Bell South Mobility can verify that I spoke to them. Therefore, I cannot understand this low score . . . .
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> I wish to deal with one instance specifically. The complaint of Becky R. regarding Brian S. I interviewed Becky and looked at the documentation and wrote a response. I specifically asked John Poindexter if I could speak to Eugene T. and Brian S. I was told No. I turned the letter over to him. I never heard a response. In the performance evaluation meeting, he told me he spoke to Brian S. privately. this is an example of di[s]parate treatment. Brian S. can get a private consultation about something that was documented, but, yet, I am asked to listen more and improve my interpersonal relationships with other employees in writing in a performance evaluation.

Douglas testified that, after O'Neill reveived his copy of her response, he told her on June 24, 1994 that she had a whistle-blower complaint and asked whether she was making such a complaint. She testified that she said, "I have to

talk to my attorney first and I will get back to you. I don't know what I want to do at this point. I have to talk to my attorney first, but I want you to have a copy because you were one of the auditors and I will get back with you later after I talk to my attorney."[9]

DPO terminated Douglas's employment on July 7, 1994, before Douglas could confer with her attorney, who was on vacation. DPO gave Douglas no explanation for her termination, but offered her "transition funds" if she would sign a release waiving her right to sue DPO. On or about July 11, 1994 Douglas filed a claim with the EEOC alleging that DPO and retaliated against her for her opposition to practices made unlawful under Title VII. The EEOC issued a right-to-sue letter and she timely filed an action against DPO in the federal district court. After a jury trial, the district court correctly instructed the jury on the law, including the elements that a plaintiff must prove to establish a prima facie case of retaliation, the defendant's burden of rebutting the plaintiff's prima facie case by offering a legitimate non-discriminatory reason for termination, and the plaintiff's burden to prove that any non-discriminatory reason for termination offered by the defendant was a pretext, cloak or cover for retaliation. The court also instructed the jury on

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[9] The panel opinion incorectly and improperly finds *de novo* that "Douglas . . . specifically instructed O'Neill not to treat the Letter as a whistle-blower complaint." *Douglas*, 144 F.3d at 373. The panel's conclusion that Douglas's response letter did not constitute protected participation is thus based on a faulty factual premise. More important, the panel overlooks that "the focus is not on whether the employee intends to follow through with filing the charge, but rather on whether the employer's decision to discharge was motivated by an improper desire to retaliate against an employee for pursuing rights granted by the Act." *Polk v. Yellow Freight Syst., Inc.*, 801 F.2d 190, 200 (6th Cir. 1981) (an employee's *visit* to a Civil Rights Commission to inquire about rights under the Act is a protected activity); *see also Gifford v. Atchison, Topeka & Santa Fe Ry.*, 685 F.2d 1149, 1156 n.3 (9th Cir. 1982) ("no legal distinction . . . between . . . filing of a charge . . . and threatening to file a charge.").

the Louisiana Rules of Professional Conduct, one of which prohibits a lawyer from revealing information relating to representation of a client except to the extent the lawyer reasonably believes it necessary to establish a claim or defense in behalf of the lawyer in a controversy between the lawyer and the client or to resond to allegations in any proceeding concerning the lawyer's representation of the client.

The jury rendered a verdict in favor of Douglas, finding that a determinative factor in her discharge was that she engaged in an activity protected by Title VII, and awarding her compensatory and punitive damages and back pay. the district court reduced Douglas's award to $307,830 in accordance with the statutory cap and denied DPO's motion for a judgment as a matter of law or remittitur and denial of punitive damages with written reasons.

II. DISCUSSION

A. Departure From *McDonnell Douglas* Framework

The panel opinion overrules, in part, the Supreme Court's *McDonnell Douglas-Burdine-Hicks* framework for production and proof in Title VII cases (and our en banc decision in *Rhodes v. Guiberson* adopting and explaining the framework) by creating an anomalous new mandatory rule of law, *viz.*, that the employer's production of evidence that an attorney-employee, in her opposition activity, revealed any confidential employment-related information, does not merely dispel the presumption created by the employee's *prima facie* case that the employer discriminated against the attorney-employee because of her opposition; instead it automatically and conclusively destroys Title VII's protection against employer retaliation for the employee's opposition activity; unlike all other employees, an attorney is

deprived of the opportunity guaranteed by the *McDonnell Douglas* framework to demonstrate that he employer's proffered reason for adverse employment action was a pretext or coverup for retaliation.

1. The *McDonnell Douglas-Burdine-Hicks-Rhodes Framework*

With the goal of "progressively sharpen[ing] the inquiry into the elusive factual question of intentional discrimination." *St.Mary's Honor Ctr. v. Hicks,* 509 U.S. 502, 506 (1993) (quoting *Texas Dept. of Community Affairs v. Burdine,* 450 U.S. 248, 255 (1981)), the Supreme Court in *McDonnell Douglas* "established an allocation of the burden of production and an order for the presentation of proof in Title VII discriminatory-treatment cases." *Id.*; *Rhodes v. Guiberson Oil Tools,* 75 F.3d 989, 992 (5th Cir. 1996) (en banc). The plaintiff first must establish, by a preponderance of the evidence, a "prima facie" case of discrimination. *See Hicks,* 509 U.S. at 255 (citing *Burdine,* 450 U.S. at 252-53); *Rhodes,* 75 F.3d at 992. Establishment of such a prima facie case creates a presumption that the employer unlawfully discriminated against the employee. *Hicks,* 509 U.S. at 255; *Burdine,* 450 U.S. at 254; *Rhodes,* 75F.3d at 992. This presumption places on the defendant the burden of producing evidence that the challenged employment action was taken for a legitimate, nondiscriminatory reason. *Hicks,* 509 U.S. at 507; *Burdine,* 450 U.S. at 254; *Rhodes,* 75 F.3d at 992-93.The defendant must clearly set forth, through the introduction of admissible evidence, reasons for its actions which, "*if believed by the trier of fact,*" would support a finding that unlawful discrimination was not the cause of the employment action. *Hicks,* 509 U.S. at 507; *Burdine,* 450 U.S. at 254-55; *Rhodes,* 75 F.3d at 993.

"[T]he determination that a defendant has met its

burden of production (and has thus rebutted any legal presumption of intentional discrimination) can involve no credibility assessment." *Hicks,* 509 U.S. at 509. "For the burden-of-production determination necessarily *precedes* the credibility-assessment stage. At the close of the defendant's case, the court is asked to decide whether an issue of fact remains for the trier of fact to determine." *Id.* (italics in original).

If the defendant succeeds in carrying its burden of production, the presumption, having fulfilled its role of forcing the defendant to come forward with some response, simply drops out of the picture, and the trier of fact proceeds to decide the ultimate question of whether the plaintiff has proved that the defendant intentionally discriminated against her. *Id.* at 511; *Burdine,* 450 U.S. at 253; *Rhodes,* 75 F.3d at 993. the plaintiff now must have ' "the full and fair opportunity to demonstrate,' through presentation of his own case and through cross-examination of the defendant's witnesses, 'that the proffered reason was not the true reason for the employment decision," and that unlawful discriminataion was. *Hicks,* 509 U.S. at 507-08 (quoting *Burdine,* 450 U.S. at 256); *see Rhodes,* 75 F.3d at 993. Thus, the requirement that the employer produce evidence clearly setting forth its reasons for the challenged employment action gives the plaintiff a "full and fair" rebuttal opportunity. *Hicks,* 509 U.S. at 516 (quoting *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 805 (1973) ("[O]n the retrial respondent must be given a full and fair opportunity to demonstrate by competent evidence that the presumptively valid reasons for his rejection were in fact a coverup for a racially discriminatory decision. We . . . insist that respondent . . . must be given a full and fair opportunity to demonstrate by competent evidence that whatever the stated reasons for his rejection, the decision was in reality racially premised.")); *Burdine,* 450 U.S. at 255; *see Rhodes,* 75 F.3d at 993.

In summary, (1) the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case that the employer's employment action constituted unlawful discrimination; (2) the prima facie case creates a presumption of discrimination in favor of the plaintiff; (3) if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant to produce evidence which, if believed by the trier of fact, would support a finding that the employer had a legitimate, nondiscriminatory reason for the employment action; (4) if the defendant suceeds in producing such evidence, the presumption of discrimination disappears; (5) the plaintiff now must be afforded the opportunity to prevail without the benefit of the presumption, however, by proving by a preponderance of the evidence that the employer's proffered reason for the employment action was not its real reason, but a pretext or coverup, and that in reality the employer's challenged employment action was intentional unlawful discrimination against the plaintiff.

2. The Panel Opinion's New Rules of Law Override and Attempt to Amend, in Legislative Fashion, the *McDonnell Douglas-Burdine-Hicks-Rhodes* Line of Decisions

The panel opinion announces several broad mandatory rules of law. First, it "hold[s] as a matter of law that conduct that breaches the ethical duties of [her state's] legal profession is unprotected under Title VII." *Douglas,* 144 F.3d at 376. Second, "[A]ny betrayal of a client's confidences that breaches the [state] ethical duties of the attorney[, including a "minimal disclosure of any substantive information,"] places that conduct outside Title VII's protection." *Id.* Third, "So long as the [attorney-employee's] conduct actually constituted a violation of the profession's ethically imposed duties, the employer is insulated from liability irrespective of whether it took adverse employment action because the

conduct constituted a breach or because the conduct was in opposition to discriminatory employment practices." Id. at 377 n.16. (underscoring added). Fourth, the defendant is entitled to the entry of a judgment as a matter of law dismissing the plaintiff's case, if the plaintiff's opposition conduct involved a breach of her state's ethical rule. *Id.* at 376. It is self-evident, however, that none of the panel's new rules of law can be reconciled with the Supreme Court's *McDonnell Douglas* line of cases or our en banc decision in *Rhodes.*

The holdings and underlying rationale of the panel opinion are at odds with the *McDonnell Douglas* "basic allocations of burdens and order of presentation of proof in a Title VII case. . . [.]" *Burdine,* 450 U.S. at 252, "[that] serves to bring the litigants and the court expeditiously and fairly to th[e] ultimate question [of whether the defendant intentionally discriminated against the plaintiff]." *Id.* at 253. The panel opinion erects a barrier across the McDonnell Douglas framework for employees who are attorneys, which unfairly truncates the order of proof and presentation and permits their cases to be disposed of on issues of legal ethics rather than on the ultimate Title VII question of whether the employer's action was a product of unlawful discrimination. Nothing in law permits a court to create such a legal barrier or to make such a substitution of the ultimate issue under the statute. Just as "Title VII is not a cause of action for perjury," *Hicks,* 509 U.S. at 514-15, 521, it is not a lawyer disciplinary proceeding either; "we have other civil and criminal remedies for that." *Id.* at 521; *see also Doe v. A Corp.,* 709 F.2d 1043, 1050 (5th Cir. 1983).

The panel opinion seems to assume that its judicial inventiveness is justified because particular kinds of employee conduct are so reprehensible that Courts of Appeals may simply abandon the *McDonnell Douglas* framework and declare that as a matter of law Title VII protection is un-

available to those who engage in such conduct while opposing unlawful employment practices. From the beginning, however, the Supreme Court in *McDonnell Douglas* made it clear that employee conduct during a protest of unlawful employment practices, even unlawful and potentially harmful conduct, cannot be used by the employer as a pretext or coverup for discriminatory adverse employment action against the employee. In *McDonnell Douglas,* the plaintiff had pleaded guilty to the deliberately unlawful and potentially very harmful activity of taking part in a carefully planned "stall-in" designed to block access and egress at the defendant's plant during a peak traffic hour to protest allegedly discriminatory employment conditions. The Supreme Court held that while "[n]othing in Title VII compels an employer to absolve and rehire one who has engaged in such deliberate, unlawful activity against it [,] . . . neither does it permit [the employer] to use [the employee or applicant's] conduct as a pretext" for unlawful discrimination prohibited by Title VII. *McDonnell Douglas,* 411 U.S. at 803-04. Moreover, the Court insisted, "[the employee or applicant] must be given a full and fair opportunity to demonstrate by competent evidence that whatever the stated reasons for his rejection, the decision was in reality [based on unlawful discrimination.]" *Id.* at 804, 807 ("[R]espondent must be afforded a fair opportunity to demonstrate that petitioner's assigned reason for refusing to re-employ was a pretext or discriminatory in its application.") These principles have been reiterated fully and firmly by the Supreme Court and this court *en banc* as essential parts of the *McDonnell Douglas-Burdine'Hicks-Rhodes* framework.

Consequently, the rules of law announced by the panel opinion to the effect that an attorney-employee's unethical conduct, *per se* and *as a matter oflaw,* places the employee's opposition to unlawful employment practices outside the protection of Title VII are manifestly contrary to the Supreme

Court decisions and our own en banc decision. The third and fourth rules of the panel opinion, in particular, are diametrically opposed to the plain statements and holdings of the Supreme Court and this court en banc. Instead of heeding the Supreme Court's insistence that the plaintiff be accorded a full and fair opportunity to demonstrate that the defendant's proffered reason for the challenged employment action was not its real reason, but that the defendant's discriminatory retaliation for opposition to unlawful employment practices was, the panel opinion flatly deprives the plaintiff of such an opportunity by holding that the employer's true reason, even if it was unlawful discrimination, is irrelevant so long as the employee's conduct actually violated a rule of professional ethics. *Compare Douglas,* 144 F.3d at 377 n.16 ("So long as the [employee's] conduct actually constituted a violation of the profession's ethically imposed duties, the employer is insulated from liability *irrespective of whether it took adverse employment action because the conduct constituted a breach or because the conduct was in opposition to discriminatory practices.*") (emphasis added) with *McDonnell Douglas,* 411 U.S. at 805 n.18 ("We do. . . insist that [the plaintiff] . . . must be given a full and fair opportunity to demonstrate by competent evidence that whatever the stated reasons for his rejection, the [employer's] decision was in reality [discrimination]."). *See also id.* at 807 ("[The plaintiff] must be afforded a fair opportunity to demonstrate that petitioner's assigned reasons for refusing to re-employ was a pretext or discriminatory in its application. If the District Judge so finds, he must order a prompt and appropriate remedy."); *Burdine,* 450 U.S. at 253 ("[S]hould the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination."); *Hicks,* 509 U.S. at 507-08 ("The plaintiff then has 'the full and fair opportunity to demonstrate,' through presen-

tation of his own case and through cross-examination of the defendant's witnesses, 'that the proffered reason was not the true reason for the employment decision,' and that [discrimination] was. He retains that 'ultimate burden of persuading the [trier of fact] that [he] has been the victim of intentional discrimination.' ") (citations omitted); *Rhodes,* 75 F.3d at 993 ("[T]he plaintiff is accorded the opportunity to demonstrate that the defendant's articulated rationale was merely a pretext for discrimination").

When an appropriate factfinder determines, according to proper procedures, that the employer has unlawfully discriminated, this court has no authority to declare that employer immune from liability as a matter of law for the sole reason that the employee committed a breach of ethics in opposing unlawful employment practices. The Supreme Court has recognized that even it cannot engraft such substantive rules upon the statute:

> We may, according to traditional practice, establish certain modes and orders of proof, including an initial rebuttable presumption of the sort we described earlier in this opinion, which we believe *McDonnell Douglas* represents. But nothing in law would permit us to substitute for the required finding that the employer's action was the product of unlawful discrimination, the much different (and much lesser) finding that the employer's explanation of its action was not believable.

Hicks, 509 U.S. at 514. By the same token, nothing in the law permits this court to substitute, for the Congressional requirement of a prompt and appropriate remedy for a proven victim of an employer's unlawful discrimination under Title VII, this court's own rule of absolute immunity for

employers in every case in which an attorney-employee violates an ethical rule while opposing unlawful employment practices.

In Title VII intentional discrimination cases brought by employees who happen also to be attorneys, the panel opinion threatens the destruction of the *McDonnell Douglas* framework, which has been carefully crafted in precedents as old as 25 years.[10] The handling of litigation based on federal statutes in an orderly and sensible manner heavily depends upon the structures, modes of proof and orders of presentation established by the Supreme Court in such cases

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[10] The panel opinion is directly contrary to this court's proper application of the *McDonnell Douglas* framework in *Payne v. McLemore's Wholesale & Retail Stores*, 654 F.2d 1130 (5th Cir. Unit A Sept. 1981), *cert. denied*, 455 U.S. 1000 (1982). The *Payne* court stated "[i]f the defendant took adverse employment action against the plaintiff because of opposition conduct by the plaintiff that was outside the protection of the statute, then the defendant **may have had** a legitimate, nondiscriminatory reason to justify its actions." *Id.* at 1142 (emphasis added). The emphasized language is important; it clearly indicates that the analysis does not end when the employer produces evidence of a legitimate nondiscriminatory reason for its employment action. The *Payne* court continued and acknowledged the necessary final step of the *McDonnell Douglas* framework that the panel in *Douglas* disregarded:

> Since the court further found that plaintiff failed to establish that defendant's proffered justification was in fact pretextual, the court concluded that '(b)ecause plaintiff exceeded the limits of reasonable opposition activity on a continuing basis and his dismissal is attributable to these transgressions, the Court is forced to conclude that his termination was not pretextual, but rather was for valid nondiscriminatory reasons.'

Id. at 1143 (quoting *Gonzalez v. Bolger*, 486 F. Supp. 595, 601-02 (D.D.C. 1980), *aff'd*, 656 F.2d 899 (D.C. Cir. 1981) (table case)). Under this proper analysis, if the employer produces evidence that its adverse employment action was because of the employee's unreasonable conduct, and if the employee fails to establish that the employer's proffered reason for its adverse employment action was a pretext for unlawful discrimination, then and only then is the employer entitled to judgment that the employee has failed to prove an unlawful employment practice under § 704(a).

as *McDonnell Douglas*. We ought not casually abandon these structures and precedents, even in special classes of cases, or worthy but adjunctive purposes. "Considerations of stare decisis have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done." *Patterson v. McLean Credit Union*, 491 U.S. 164, 172-73 (1989). Congress has taken no action to indicate that amendments creating exceptions to the *McDonnell Douglas-Burdine-Hicks-Rhodes* framework, of the kind that will be affected by the panel opinion's rules of law, are necessary or desirable.

B. Departaure From The *Boeing* Jury Verdict Review Standard

1. *Rhodes v. Guiberson Oil Tools* Requires That Title VII Jury Verdicts Be Tested Under the *Boeing Co. v. Shipman* Standard

In *Rhodes v. Guiberson Oil Tools*, 75 F.3d 989, 993 (5th Cir. 1996) (en banc), this court held that a jury verdict in a *McDonnell Douglas-Burdine* case must be tested for sufficiency of the evidence under the standard of *Boeing Company v. Shipman*, 411 F.2d 365 (5th Cir. 1969) (en banc), *overruled* in part on other grounds, *Gautreaux v. Scurlock Marine, Incorporated*, 107 F.3d 331 (5th Cir. 1997) (en banc). In *Boeing*, the court adopted, as "a proper standard in federal court to test the sufficiency of the evidence for submission of a case to the jury, in connection with motions for a directed verdict and for judgment notwithstanding the verdict," *Id.* at 367, the following standard:

> On motions for directed verdict and for judgment notwithstanding the verdict the Court should consider all of the evidence — not just that

> evidence which supports the non-mover's case — but in the light and with all reasonable inferences most favorable to the party opposed to the motion. If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting of the motions is proper. On the other hand, if there is substantial evidence opposed to the motions, that is, evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the motions should be denied, and the case submitted to the jury. The motions for directed verdict and judgment n.o.v. should not be decided by which side has the better of the case, nor should they be granted only when there is a complete absence of probative facts to support a jury verdict. There must be a conflict in substantial evidence to create a jury question. However, it is the function of the jury as the traditional finder of the facts, and not the Court, to weigh conflicting evidence and inferences, and determine the credibility of witnesses.

Id. at 374-75 (footnote omitted).

The *Boeing* standard applies to circumstantial as well as direct evidence. *Rhodes*, 75 F.3d at 993. Because direct evidence of discrimination is rare, a plaintiff in a discrimination case must ordinarily use circumstantial evidence to satisfy her burden of persuasion. *Id.* (citing *Davis v. Chevron U.S.A., Inc.*, 14 F.3d 1082, 1085 (5th Cir. 1994)). Consequently, a plaintiff need not provide direct evidence to sustain a jury finding of discrimination. *Id.* (citing, e.g., *Burns v. Texas City Refining, Inc.*, 890 F.2d 747, 751 (5th Cir. 1989)).

To sustain a finding of discrimination, circumstantial evidence must be such as to allow a rational factfinder to make a reasonable inference that discrimination was a determinative reason for the employment decision. *Id.* at 894. The factfinder may rely on all of the evidence in the record to draw an inference of discrimination. *Id.* In *Rhodes*, this court stated:

> In tandem with a prima facie case, the evidence allowing rejection of the employer's proffered reasons will often, perhaps usually, permit a finding of discrimination without additional evidence. Thus, a jury issue will be presented and a plaintiff can avoid summary judgment and judgment as a matter of law if the evidence taken as a whole (1) creates a fact issue as to whether each of the employer's stated reasons was what actually motivated the employer and (2) creates a reasonable inference that [discrimination] was a determinative factor in the actions of which plaintiff complains. The employer, of course, will be entitled to summary judgment if the evidence taken as a whole would not allow a jury to infer that the actual reason for the discharge was discriminatory.

Id.

2. Departure From *Boeing Rhodes* Sufficiency of the Evidence Standards

The panel opinion did not test the sufficiency of the evidence for submission of this *McDonnell Douglas-Burdine-Hicks* case to the jury under the proper standards as required by our en banc decisions in *Rhodes* and *Boeing*, but instead

applied the panel's new mandatory rules of law to facts found *de novo* by the panel and concluded that as a matter of law that the employer was entitled to a judgment as a matter of law dismissing the employee's case.

The panel opinion turned its back on stare decisis and decided the case according to its own freestanding rules of law. The panel was duty bound in this *McDonnell Douglas-Burdine-Hicks* case by our en banc opinion in *Rhodes* to test the jury verdict for sufficiency of the evidence under our en banc *Boeing* standard, as elaborated on in *Rhodes*. The panel breached that duty by disregarding the *McDonnell Douglas* framework, refusing to determine whether the correctly instructed jury reasonably could have found for the plaintiff based on the evidence it saw and heard. The panel found the facts of the case *de novo*, and applied its own new mandatory rules of law to those facts.

The rationale of the panel decision is as follows: In a Title VII intentional discrimination case, in reviewing a defendant employer's appeal from a judgment for an attorney-employee plaintiff, based on a jury verdict in the plaintiff's favor, when the defendant argues on appeal that it terminated the plaintiff because of her unethical disclosures and not because of her opposition to the defendant's unlawful employment practices: (1) The court "must first determine [from a *de novo* review of the record] whether [the attorney-employee] breached her professional ethical duties." *Douglas*, 144 F.3d at 370; (2) Upon determining that the attorney-employee violated her ethical obligations, the court must next decide "whether [the employee] demonstrated that [the employer] unlawfully retaliated against her when it terminated her employment." *Id.* at 372; (3) If the court determines (or assumes) that the plaintiff employee demonstrated that the employer terminated her because of her opposition to unlawful employment practices, the court engages in a

balancing test to determine whether the opposition is entitled to protection under Title VII, in this particular case, by weighing both the employer's interest as a client in having the attorney-employee abide by state professional ethical rules *and* the state legal profession's interest in promoting ethical conduct and discouraging unethical conduct, *against* the attorney-employee's individual federal statutorily protected interest under Title VII to oppose allegedly discriminatory practices by her employer. *Id.* 375-76; (4) Upon the panel's first application of this new test in the present case, it concluded that if the individual attorney-employee's opposition to the employer's alleged unlawful practices under Title VII involves a violation of an applicable state legal professional ethical rule, the employee's federal right or statutorily protected interests can never in any such case counter the weight of the interests of the employer-client and the state legal profession; (5) Consequently, the panel transformed the balancing test into four overlapping hard-and-fast rules of law: (i) An attorney-employee's opposition to an unlawful employment practice that involves a breach of a state ethical rule imposing duty for the benefit of a client is unprotected under Title VII; (ii) The magnitude of the attorney's transgression and the risk of harm created are not relevant: "any betrayal of a client's confidences that breaches the ethical duties of the attorney places that conduct outside Title VII's protection [against retaliatory discrimination by the employer]." *Id.* at 376; (iii) If the attorney-employee's opposition conduct involves a violation of a professional ethical rule, "the employer is insulated from liability irrespective of whether it took adverse employment action because the conduct constituted a breach or because the conduct was in opposition to discriminatory employment practices." *Id.* at 377 n.26; (iv) Consequently, the employer in such a case is entitled as a matter of law to a judgment as a matter of law dismissing the employee's case. *Id.* at 376.

Under the panel opinion's new rules, the allocation of

the burden of production and order for the presentation of proof established for Title VII discriminatory-treatment cases by the Supreme Court, i.e., the *McDonnell Douglas-Burdine-Hicks* framework, as well as the *Boeing-Rhodes* standards for testing jury verdicts, will be virtually obsolete in a case involving an alleged ethical violation by an attorney-employee while opposing an unlawful employment practice. The panel opinion indicates, although it does not explicitly hold, that the question of whether an attorney-employee violated her state professional code as part of her opposition to an unlawful employment practice is a question of law for the court that cannot be submitted to the jury. Thus, once the court at the trial or appellate level decides that such a violation occurred as part of the attorney-employee's opposition to an unlawful employment practice, the entirety of the employee's opposition conduct becomes completely unprotected under Title VII. The panel opinion expressly holds, in diametric opposition to *McDonnell Douglas, Burdine, Hicks* and *Rhodes,* that the plaintiff in such a case cannot prevail by proving that the ethics breach was a pretext and not the true reason for the challenged adverse employment action, but that the real reason was the employer's intentional discrimination against the employee. Consequently, few Title VII intentional discrimination suits brought by attorney-employees may survive motions for summary judgment or judgment on the merits or appeals, even though the employees may be able to demonstrate that the employers' actions were motivated by unlawful discrimination rather than a legitimate, nondiscriminatory reason.

C. Adherence to *McDonnell Douglas, Burdine, Hicks, Rhodes* and *Boeing* Requires That the Plaintiff's Jury Verdict Be Upheld

In the present case, there definitely was sufficient evidence from which the jury reasonably could have found

that DPO's proffered reasons for the discharge were false and pretextual and that Douglas's opposition to unlawful employment practices was a determinative reason for the termination of her employment. There was a close and suspicious temporal proximity between Douglas's opposition and her discharge. Upon receipt of Douglas's response letter complaining of EEO violations, which showed that a copy had been sent to the DOE whistle-blower officer responsible for receiving EEO complaints from DPO employees, DPO immediately convened a "termination board" and decided to terminate Douglas's employment. Based on the evidence introduced at trial, the jury reasonably could have found that DPO's "ethical" reason for terminating Douglas's employment was in fact a pretext because: (1) The statements in Douglas's June 24, 1994 reaponse that DPO proffered as its reason for discharging Douglas were not in fact disclosures to DOE because DOE already had the information and it was insignificant anyway; the jury reasonably could have disbelieved DPO because of this alone; or (2) if Douglas revealed any confidential information, her revelation was authorized by Rule 1.6 (b), as an exception to Rule 1.6(a), because she reasonably believed the revelation to be necessary to establish a claim or defense on her behalf in a controversy with her client, DPO, or necessary to respond to allegations concerning her representation of DPO; or (3) from the record as a whole, it is evident that DPO's discharge of Douglas was motivated by Douglas's opposition to unlawful employment practices and not by any breach of a professional ethical rule she allegedly may have committed.

Under the government contract between DPO and DOE, DPO, the contractor, waived its rights of confidentiality and privilege with respect to Douglas's June 24, 1994 response letter when it agreed that "[a]ll records acquired or generated by the contractor under this contract in the possession of the contractor, including [performance

appraisals, reviews, and associated documents, equal employment opportunity and affirmative action claims and records, files and records concerning ethics and security investigations, and attorney-client privilege or attorney work product] shall be subject to inspection, copying, and audit by the government at all reasonable times[.]" (emphasis added).

Douglas's response to her performance appraisal was an "associated document." Poindexter testified that Douglas was terminated because the information contained in her statements in the response letter with regard to Bell South Mobility and Becky R. and Brian S. was Douglas's "attorney work product." Therefore, Douglas's June 24, 1994 response letter and her attorney work product concerning the Bell South Mobility and the Becky R. and Brian S. matters were subject to inspection, copying, and audit by the government at all reasonable times pursuant to the government contract between DOE and DPO.

Also, from the beginning of the appraisal, DPO was required to disclose to the DOE team a list of EEO-related complaints and disposition actions taken since contract inception. Becky R. had submitted a complaint against Brien S. to DPO's human resources department. Douglas had been required to confer with DOE employees about their using DPO cellular phones for personal calls in a effort to resolve that problem with Bell South Mobility.

For all of these reasons, the jury reasonably could have concluded that Douglas's June 24, 1994 response letter did not in reality disclose any new information to DOE, or that DPO had expressly waived its rights of confidentiality and privilege with respect to this letter, and that the Becky R. and Bell South Mobility statements in Douglas's response were not the true reasons for Douglas's discharge.

As indicated by the district court's reasons for rejecting DPO's motion for judgment as a matter of law, the jury also reasonably could have found that Douglas had not made a prohibited revelation under Rule 1.6 because she reasonably believed her statements were necessary to establish a claim or defense by her in a controversy with DPO or to respond to DPO's allegations concerning her representation:

> The crux of the defendants' complaint is that the plaintiff disclosed confidential matters in her memorandum which should not have been disclosed to persons outside the company. These matters related to (1) bills from Bell South Mobility and (2) the manner in which other employees' performances were evaluated compared to hers. With respect to Bell South, the plaintiff's performance evaluation[, a recorded company document prepared by Poindexter, Douglas's supervisor,] specifically referenced her handling of that matter as a reason for a negative rating. The plaintiff's response referencing it was therefore not unreasonable. Most of her explanation dealt with generic steps she took in handling the matter, with minimal disclosure of any substantive information. Likewise, her discussion of "Becky R." and "Brian S." did not disclose any substantive in-house information. It also related directly to the plaintiff's complaint that she was the victim of disparate treatement in *her* performance evaluation For those reasons, the Court finds there was a "legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue."

(Emphasis and internal quotations in original)

Finally, even if the jury did not immediately disbelieve DPO's proffered reason for discharge because she did not

actually disclose any new information to the DOE, or information to which DOE was not otherwise contractually entitled, in her June 24, 1994 response statement, the jury reasonably could have found from the evidence as a whole that DPO discharged Douglas because in her June 24, 1994 response she opposed unlawful employment practices under § 704(a) of Title VII, and not because of the information disclosed in her statements about the Becky R. complaint or the Bell South Mobility business matter. The evidence taken as a whole, including Douglas's opposition, DPO's termination of her employment, the suspicious temporal proximity between them, the fact that the statements were not truly disclosures and that no potential or actual harm resulted, DPO's contractual obligation to disclose such information during a DOE audit, the necessity for Douglas's minimal references to these matters to allege facts indicating discrimination against her by the defendants, the lack of any showing that DPO previously had genuinely considered such matters to be strictly confidential or had discharged employees for such disclosures, and Poindexter's pre-existing animosity towards Douglas, fully support the jury's rejection of the reasons for discharge offered by the defendants and the finding that retaliatory discrimination was the determinative reason for the adverse employment decision. Moreover, because Poindexter, during his performance evaluation interview with her, told Douglas that he and Jocelyn Guarisco, DOE chief counsel, decided that Douglas had committed unspecified breaches of professional ethics during the appraisal meeting, the jury reasonably could have found that Poindexter's failure to discharge her, but rating her "Fully Satisfactory" at that time, indicated that he and DPO did not consider her breaches so serious as to warrant her discharge, and that her later opposition to unlawful practices in her response letter was probably what motivated DPO to discharge her.

The jury was correctly instructed that, in order to return a verdict for Douglas, it must find by a preponderance of the evidence, "that defendants' offered reasons [for discharging Douglas] are pretextual, that is, they are not the true reasons for her discharge. In other words, Ms. Douglas must prove by a preponderance of the evidence that the reasons stated by the defendants were only a cover or a cloak for retaliation." Because we must presume that the jury followed the trial court's instructions, *United States v. Brito*, 136 F.3d 397, 413 (5th Cir.), *cert. denied*, 118 S. Ct. 1817, *cert. denied*, 118 S. Ct. 2398, *cert. denied*, 119 S. Ct. 159 (1998), we must necessarily conclude that the jury, in specifically finding that Douglas was discharged because of her protected opposition, found that DPO's offered reason for the termination of Douglas's employment was pretextual, false and only a cover for its unlawful retaliation. Moreover, the jury in making the requisite factual determination for imposing punitive damages explicitly found that "defendants acted wilfully and maliciously, or in reckless disregard of plaintiff's federally protected rights in the discharge of plaintiff in retaliation for her participation in a protected activity."

III. THE PANEL OPINION OVERRULES *JONES V. FLAGSHIP, DOE V. A CORPORATION* AND MISINTERPRETS RULE 1.6

Doe v. A Corporation., 709 F.2d 1043 (5th Cir. 1983); and *Jones v. Flagship International*, 793 F.2d 714 (5th Cir. 1986), *cert. denied*, 479 U.S. 1065 (1987), held that lawyers' ethics rules cannot be asserted to bar a lawyer's access to court to adjudicate her own personal rights against her client (as opposed to representing other persons against her client). The panel opinion overrules *Doe* and *Jones* by allowing an employer-client to assert an ethics rule to bar attorney-employees' enforcement of their own personal Title VII unlawful discrimination claims. The opinion creates a

mandatory rule of law granting a client-employer absolute immunity from liability for retaliation prohibited by Title VII against an attorney-employee for opposing unlawful employment practices, if the attorney-employee breached an ethics rule in her opposition. In addition to this new barrier to an attorney-employee's attempt to vindicate her personal claims, the panel opinion further disadvantages every Louisiana attorney having a dispute with any client by incorrectly interpreting Louisiana State Bar Association Rule of Professional Conduct 1.6 to require that the attorney must file a formal administrative or judicial complaint before there can be a "controversy" with the client that would allow the lawyer to reveal confidential information necessary to the enforcement or defense of the lawyer's own personal rights.

A. *Doe v. A Corporation*

In *Doe,* this court held that a former in-house counsel could prosecute an action in his own behalf against his former employer with respect to claims arising under ERISA, despite his having advised the employer corporation on matters related to his lawsuit, but that he was ethically barred from prosecuting such litigation either as an attorney for or as the class representative for other employees. The court pointed out that adherence to Canon 4 requires that a lawyer be disqualified from representing a party to litigation if the adversary party can show that matters in the suit are substantially related to matters in which the attorney previously represented the adversary. *Doe,* 709 F.2d at 1046. But, the court held that lawyers' ethical rules cannot be asserted to prevent a lawyer from having access to the courts to vindicate her own personal rights or tenable legal claims. *Id.* at 1047. Moreover, the court stated, a lawyer may reveal confidential information and secrets when it is necessary for her to do so to prevent the client from committing a crime, to collect a fee, or to defend herself against an accusation

of wrongful conduct. *Id.* at 1048.

> The rationale for the last of these exceptions is: "It would be a manifest injustice to allow the client to take advantage of the rule of exclusion as to professional confidence to the prejudice of his attorney, or that it should be carried to the extent of depriving the attorney of the means of obtaining or defending his own rights." ABA Opinion 250 (1943).

Id. at 1048-49 (footnote citing authorities omitted).

In its own words, the *Doe* court concluded:

> A lawyer, however, does not forfeit his rights simply because to prove them he must utilize confidential information. Nor does the client gain the right to cheat the lawyer by imparting confidences to him. . . . There is no special interest in allowing the corporation to conceal wrongdoing, if in fact any has occurred. Nor is there any social interest in allowing it to deny Doe pension rights or insurance benefits if they are legally due him. But that would be the effect of our refusing to allow Doe to prosecute his individual lawsuit.

Id. at 1050.

B. *Jones v. Flagship*

Jones v. Flagship also recognized an attorney's right to pursue her own personal claim against her client-employer and, although decided prior to *Hicks* and *Rhodes*, faithfully applied the *McDonnell Douglas-Burdine* framework to ascertain that the attorney-employee had been afforded a full opportunity to rebut the employer's evidence that it had a legitimate, nondiscriminatory reason for suspending and

firing her. In *Jones*, the district court entered a judgment for the employer after a bench trial. Although this court affirmed, it first ascertained that the employee had been given the opportunity to demonstrate that the employer's proffered reasons for her suspension and termination were not the true reasons for the employment decision. *Jones*, 793 F.2d at 725 n.11 (citing *McDonnell Douglas* and *Burdine*). This court recognized that Jones, although an attorney and Flagship's manager of EEO programs, had a right to be free of discriminatory practices under the protection of § 704 (a); and that, in filing a charge against Flagship on the ground that the company had discriminated against her in terms of pay and sexual harassment, Jones was exercising a protected right under Title VII, as the district court found. *Id.*. at 726. However, Flagship produced evidence that, in addition to filing her own Title VII claims, Jones also solicited other employees to join in a class action suit against Flagship. *Id.* at 728. This court concluded that because these additional activities involving other persons' claims were unnecessary to Jones's pursuit of her own claim and were critically harmful to Flagship in all discrimination suits against it, Flagship had met its burden of production of evidence of a legitimate, nondiscriminatory basis for suspending and firing Jones. *Id.* at 729. In affirming the district court's judgment, this court held that, "although Jones did establish a prima facie case of unlawful retaliation under §704 (a) of Title VII, under the *McDonnell-Burdine* allocation of burdens and order of presentation of proof, Flagship sufficiently rebutted Jones' case by adducing evidence that it suspended and fired Jones for nonretaliatory reasons [; and] that Jones did not demonstrate that the reasons proffered by Flagship were pretexts for discrimination." *Id.* at 729-30.

C. Rule 1.6

The panel opinion, by holding that Louisiana State

Bar Association Rule of Professional Conduct 1.6 provides that a lawyer-employee cannot have a controversy with, or claim or defense against, her client, which would allow the attorney to reveal confidential information to the extent necessary to enforce or defend the attorney's own personal rights, until the lawyer files a formal judicial or administrative petition against the client, incorrectly interprets the rule and further undermines every attorney's access to courts for the vindication of personal rights and claims. The panel opinion cites no authority and provides no reason for its eccentric reading of the rule. When the words of the rule are taken in their ordinary and usual sense it is evident that the drafters of the rule were aware that in reality controversies, claims and defenses usually arise before pleadings are filed because of them, and not the other way around. For example, the Comment to Rule 1.6 of the ABA Model Rules of Professional Conduct states that an attorney's right to respond to charges of misconduct involving representation of the client arises when an assertion has been made, and that paragraph (b) (2) of Rule 1.6 does not require the attorney to await the commencement of an action or proceeding. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 cmt. 18 (1983). The jurisdictional tenets of both Louisiana and federal courts and administrative agencies require that a case or controversy must preexist the commencement of proceedings. The panel opinion's interpretation of the rule unnecessarily adds an additional technical snare to discourage the enforcement of an attorney's valid personal claim. In Title VII discrimination cases, the panel's misreading of the rule will have an uncalled for chilling effect upon the enforcement of an attorney-employee's federal constitutional and statutory rights. Judicial efficiency, as well as the purposes of Title VII, would be better served by a straightforward reading of Rule 1.6 to recognize that whenever a serious controversy arises between a lawyer and her client, the attorney, as well as the client, prior to filing a formal complaint, may

disclose information necessary to the evaluation, protection and enforcement of legal rights, including the seeking of legal and other expert advice, the gathering of evidence, and the identification and evaluation of potential witnesses.

For all these reasons, I respectfully disagree with our court's decision not to rehear this case.[11]

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[11] Contrary to Judge Jolly's opinion that a majority of this court approves of his opinion, I do not believe that all of the judges who voted not to hear this case en banc did so for that reason. This court's case load approaches 8,000 appeals per year. We can only bring the entire court together to rehear a minuscule portion of the cases. Many of the judges who voted "no" probably did so because they thought we have already overfilled our en banc dockets or that there were more important cases that should be heard en banc. I, of course, respectfully disagree but recognize that that is the prerogative of each judge.

E. GRADY JOLLY, Circuit Judge, Response to Dissent From the Denial of Rehearing En Banc:

With all due respect, the dissent is unnecessarily overwrought by the captioned opinion. Contrary to the dissent's ominous outlook, *Douglas v. DynMcDermott Petroleum,* 144 F.3d 364 (5th Cir. 1998) does not sound the death knell for the legal profession's Title VII rights. Nothing in *Douglas* precludes an attorney from properly filing suit under Title VII; nor does *Douglas* abrogate an attorney's right to seek redress for retaliatory discharge. *Douglas* merely holds that when an attorney pursues claims under Title VII, she must do so in a manner that does not violate her profession's ethical code. *Douglas,* 144 F.3d at 376. Because *Douglas* neither reaches the result the dissent alleges, nor engages in the de novo review the dissent asserts, such lamention over its result is unwarranted.

It should be noted that *Douglas* indeed recognizes as valid means of revealing confidential information, the exceptions under Rule 1.6 of the Louisiana State Bar Articles of Incorporation, Rules of Professional Conduct, La.Rev.Stat.Ann. § 37:219 Ch.4—App., Art. 16, which permits the disclosure, once disclosure becomes necessary in a legal dispute with the employer-client. *Douglas,* 144 F.3d at 376. *Douglas* further notes that Rule 1.6 does not bar opposition and protest in an attorney's conversations, dialogue, and remonstrations with the employer-client. *Id.*

Notwithstanding the overstated contentions running repetitively throughout the dissent, a clear majority of our court properly has concluded that *Douglas* neither transgresses the *McDonnell Douglas* framework, nor deviates from the standards articulated in *Rhodes v. Guiberson OilTools,* 75 F.3d 989 (5th Cir. 1996) (en banc) or *Boeing Company v.Shipman,* 411 F.2d 365 (5th Cir. 1969) (en banc), over-

ruled in part on other grounds, *Gautreaux v. Scurlock Marine, Inc.*, 107 F.3d 331 (5th Cir. 1997) (en banc).

For these reasons, the court has properly rejected the call for en banc in this case.

(5)

Supreme Court, U.S.
FILED
JAN 6 1999
OFFICE OF THE CLERK

No. 98-673

In The

Supreme Court of the United States

October Term, 1998

KORDICE M. DOUGLAS,

Petitioner,

versus

DYNMcDERMOTT PETROLEUM OPERATIONS COMPANY, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENTS' SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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A. Introduction.

The Petitioner's Reply and Supplemental Briefs, as well as the dissent filed below, misread the narrow scope of the Fifth Circuit's opinion and advance an untenable rule that would allow an employed attorney who has unethically revealed client confidences extrajudicially, making no attempt to protect the confidences, to then cite that unethical behavior as a "protected activity" under Title VII. The opinion below does not deny employed attorneys the protection of Title VII nor does it prevent them from using client confidences to prove a Title VII violation *if* the attorney seeks, from a judge or appropriate tribunal, the appropriate protections of these confidences.

The opinion below was narrowly written and carefully crafted. It is in accord with decisions of this Court. It is not inconsistent with other rulings of the Fifth Circuit and does not misconstrue Rule 1.6 of the Louisiana Rules of Professional Conduct, and in any event these matters are not appropriate issues for this Court's review.

B. The Opinion Below Is Narrow

In the process of attempting to characterize the Fifth Circuit's opinion as broad and far ranging, the Petitioner and the dissent both make statements that are at odds with the record. The dissent asserts that the Petitioner might have been in the process of considering treating her five-page response as a whistle-blower complaint. There is no question that the Department of Energy's ("D.O.E.") Richard O'Neill, who received Ms. Douglas'

five-page "response" revealing confidences, testified Petitioner informed him at the time that it was *not* a whistleblower complaint. Tr. 409, 412. Likewise, contrary to the dissent's assertion that the jury was properly instructed, issues raised by DynMcDermott on the appeal below[1]

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[1] The Issues on Appeal, below, included:

* * * 4. Is it reversible error for the trial court to refuse to allow the Defendants to present to a lay jury expert testimony on the lawyer's duty of confidentiality and loyalty, the attorney-client privilege and his opinion as to whether the plaintiff breached her duties when:

a. the defendants believed in good faith that plaintiff had violated her ethical responsibilities and, thereafter, terminated her for these violations.

b. the plaintiff, a practicing lawyer, was permitted to testify as to her understanding and interpretation of these same duties and privileges.

5. Is it reversible error for the trial court to:

a. instruct the jury to decide whether an in-house counsel who reveals confidential and privileged information was engaged in a "protected activity" under Section 704(a) of Title VII of the Civil Rights Act [and]

b. fail to properly instruct the jury on the issues of:

i. the meaning of "protected activities" under Section 704(a) of Title VII;

ii. the specific duties of confidentiality and loyalty;

iii. the specific duty of corporate counsel;

iv. [the] meaning of confidential information protected from disclosure by attorneys without client consent;

v. the distinction between privileged and confidential information.

explicitly included: the trial court's improper jury instructions on client confidences; the failure of the trial court to allow expert testimony on the ethical rules governing lawyers as well as the standard of care lawyers must exercise to protect client confidences; and the failure of the court to properly instruct the jury on the meaning of a "protected activity," the very issue which the Petitioner now asserts as the basis of this writ application.

Petitioner did not seek a review by this Court of whether confidences were revealed; rather this matter is explicitly conceded[2] by Petitioner and implicitly by the dissent.[3] Their fall-back argument is that confidences were somehow "waived" by the D.O.E. contract; however, while the contract contains language about certain waivers relating to documents, there is nothing about waiving attorney-client confidences, and there is nothing that allows the D.O.E. to question either DynMcDermott or its in-house attorneys about oral confidential communications, to compel disclosure of such items, or to

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[2] Indeed, the first "Question Presented" by Petitioner is whether in-house counsel is protected under Title VII for "engaging in activities opposing discrimination *if, in doing so, she discloses confidential client information.*" (Emphasis supplied).

[3] The argument in both the Petitioner's Supplemental Brief (p. 2) and the dissent that there was allegedly "no harm . . . from Douglas's statements" is a concession that these statements breached confidences. Of course, "harm" of a disclosure is neither a test of nor a defense to whether information is confidential and must be assiduously protected by counsel; all confidences are protected.

require DynMcDermott or its in-house counsel to create documents containing such confidences.

Under the facts in this case, where the alleged "protected activity" consisted solely of disclosure of client confidences – a disclosure not incidental to some other protected activity, but a continued revelation of confidential information that is the only protected activity claimed – the Fifth Circuit's ruling is narrow and justified. The Fifth Circuit's opinion was cautious and limited in its approach. It held that Petitioner "did not surrender her Title VII rights when she signed on with DynMcDermott as its in-house counsel" 144 F.3d at 376. It further held when the "specific right asserted" is to oppose allegedly unlawful practices *"in a manner* that violates the ethical duties" of the profession,[4] then and only then does the scale tip in favor of the employer's legitimate business interests. This ruling, allowing an execution of the balancing test by a legal analysis (in lieu of a full-fledged trial) or in a post-trial ruling, is entirely congruent with opinions from the First, Fourth, and Ninth circuits, all of which have held that this type of determination may be made in summary proceedings. *Hochstadt v. Worcester Foundation for Experimental Biology,* 545 F.2d 222 (1st Cir. 1976) (denial of preliminary injunction); *Laughlin v. Metropolitan Washington Airports Authority,* 149 F.3d 253 (4th Cir. 1998) (summary judgment); *O'Day v. McDonnell Douglas Helicopter Company,* 79 F.3d 756 (9th Cir. 1996) (summary judgment). In each of these decisions the circuit court held as a matter of law that the case should not proceed further because the employee's actions were not

[4] *Id.*, emphasis supplied.

within the realm of a "protected activity" and/or because the discharge had a legally non-discriminatory basis.

Once individuals become members of the Bar, their professional and ethical obligations to protect their clients' confidences and privileges become paramount. For example, an attorney may not rely upon the First Amendment as a basis to breach either client confidences or privileges. *Cf. Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1052 (1991). Likewise, the right to practice as an attorney and to represent clients must give way to the obligation to protect confidences. *Chugach Electrical Association v. United States District Court*, 370 F.2d 441, 444 (9th Cir. 1966), *cert. denied*, 389 U.S. 820 (1967). Accord: *Doe v. A Corporation*, 709 F.2d 1043, 1047 (5th Cir. 1983); *Kurbitz v. Kurbitz*, 468 P.2d 673 (Wash. S.Ct. 1970). All the Fifth Circuit did was to recognize this paramount obligation and hold that an attorney may not breach confidences and then seek shelter under the umbrella of Title VII from the fallout of the very action that constituted the breach.

C. The Ruling Is Not Inconsistent With The Decisions of This Court

Petitioner and the dissent assert that the Fifth Circuit's ruling is contrary to the holdings of what they term the "McDonnell Douglas-Burdine-Hicks" framework.[5] The essence of their argument is that once an in-house

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[5] *McDonnell Douglas Corporation v. Green*, 411 U.S. 792 (1973); *Texas Dept. Of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993). To this grouping the dissent also adds *Rhodes v. Guiberson Oil Tools*, 75 F.3d 989 (5th Cir. 1996).

attorney has made a claim of "protected activity," that attorney is entitled automatically to proceed to trial and no post-judgment evaluation of the legal basis for the asserted protected activity is allowed. This argument distorts the law.

It must be remembered that the legal issue to which the writ of certiorari is directed primarily involves whether the disclosure of confidential client information is a "protected activity." Thus, despite the extensive exegesis in the Petitioner's Supplemental Brief and the dissent about this Court's three cases beginning with *McDonnell Douglas,* the question is not whether the trial court should have let the jury determine if Petitioner was terminated because of sexual or racial discrimination, but rather whether legally there was any issue of a "protected activity" that should have gone to the jury. If the activity is not "protected," it is not actionable. Here, the "protected activities" were alleged to consist of only the oral and written disclosure of confidences, an extremely narrow and circumscribed situation.

This Court's trilogy of cases (none of which involve the issue of protected activities) has been interpreted to allow summary judgments in favor of employers even after the plaintiff has established a *prima facie* case. *Woods v. Friction Materials,* 30 F.3d 255 (1st Cir. 1994). There is no basis for the Petitioner or dissent to assert that every single issue must always go to the jury or that a F.R.C.P. Rule 50 post-trial motion for judgment as a matter of law is impermissible. *Cf. Binder v. Long Island Lighting Co.,* 57 F.3d 193 (2nd Cir. 1995).

The dissent's statements that the Opinion "unfairly truncates" the burden of proof and provides some type of wholesale exclusion of in-house counsel from Title VII's protections accords with neither the express language of the Panel nor the permissible and ethical methods by which the Panel indicated in-house counsel could vindicate their legal rights. As noted above, what is a "protected activity" can even be decided in summary proceedings as a legal issue. Further, the Panel expressly held that in-house counsel retain Title VII rights and suggested several methods by which such lawyers could fully exercise their rights without disclosing confidences or breaching their ethical duties. 144 F.3d at 375, fn. 12.

D. The Ruling Is Not Inconsistent With The Decisions of The Fifth Circuit

While the dissent argues that the Panel opinion either "departs" from or "overrules" several Fifth Circuit opinions, this argument does merit this Court's review, for there is no dispute among the circuits on this issue. In fact, the Panel opinion does not overrule *Jones v. Flagship International*, 793 F.2d 714 (5th Cir. 1986), *cert denied*, 479 U.S. 1065 (1987) or *Doe v. A Corporation*, 709 F.2d 1043 (5th Cir. 1983); rather, it explicitly cites and relies upon these decisions. 144 F.3d at 373-75.

E. The Interpretation of Rule 1.6 is Not An Issue Worthy of Review

Whether the appellate court properly construed Louisiana Rule of Professional Conduct 1.6 is not an issue that

merits this Court's review.[6] No conflict with any decision of the Louisiana Supreme Court, or for that matter, any other court is even intimated by Petitioner.

CONCLUSION

As Judge Jolly noted in his "Response to Dissent From The Denial of Rehearing En Banc," the Panel opinion does not reach "the result the dissent alleges"; rather it recognizes several valid means of dealing with confidential information in the exercise of Title VII rights and the filing of suits by in-house counsel, none of which the Petitioner even considered or attempted to use.

This case does not merit this Court's review.

Respectfully submitted,

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[6] It should be noted that the dissent discusses the Comments to the ABA Model Rules of Professional Conduct; Louisiana did not adopt the Comments or incorporate them even by reference.